Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 49 U.S.C. § 11701(c), an investigative proceeding "is dismissed automatically unless it is concluded by the [Surface Transportation] Board" within three years. In this case, shippers challenged BNSF's coal-transport rates. The Board initially found—prior to expiration of § 11701(c)'s three-year deadline—that the shippers had failed to prove BNSF's rates unreasonable. But the Board gave the shippers a second chance to make their case. Over BNSF's objection that the continued proceedings had impermissibly extended beyond § 11701(c)'s three-year deadline, the Board considered the shippers' new case, found the challenged rates unreasonable, and ordered more than $300 million in rate relief—by far the largest award ever entered by the STB. On appeal, BNSF argued (inter alia) that the Board's later order was contrary to law under § 11701(c). The D.C. Circuit refused to address that substantial challenge, even though it had been raised timely under the Board's own rules and the Board had rejected the argument on the merits. The questions presented are:

1. Whether the D.C. Circuit erred by holding that petitioner's argument challenging agency action was forfeited before the agency, when the agency had resolved the argument on its merits without ever suggesting that the argument had not been properly raised. The D.C. Circuit has joined the Fifth and Eighth Circuits by finding an administrative forfeiture in these circumstances, in square conflict with decisions of the Third, Seventh, Ninth, Tenth, and Federal Circuits.

2. Whether the D.C. Circuit erred in imposing, ex post, its own judicially-created rule of administrative forfeiture not grounded in any statute, rule, or agency practice, in conflict with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), a common carrier by railroad, is a wholly-owned subsidiary of its parent, Burlington Northern Santa Fe, LLC ("BNSF LLC"). BNSF LLC is an indirect, wholly owned subsidiary of Berkshire Hathaway Inc., a publicly-held corporation.

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The opinion of the court of appeals is reported at 604 F.3d 602 (App.1a-22a).

JURISDICTION

The D.C. Circuit denied BNSF's motion for rehearing and rehearing en banc on September 2, 2010. App.57a-60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The text of 49 U.S.C. § 11701 and 49 C.F.R. § 1111.5 are reproduced at App.61a-62a.

STATEMENT OF THE CASE

The D.C. Circuit dismissed BNSF's principal challenge to the largest reparations order ever entered by the Surface Transportation Board ("Board" or "STB") as untimely raised before the Board, even though (i) BNSF had raised the argument well before the Board's final decision, and the only applicable STB rule provides that a motion to dismiss may be made "*anytime* during a proceeding," 49 C.F.R. § 1111.5 (emphasis added); (ii) the Board had rejected the argument on the merits without any suggestion—by the Board or the complainant shippers ("WFA")—that it was untimely, and (iii) neither the Board nor WFA argued that the argument was untimely in their briefs to the court of appeals. That holding is fundamentally misguided in at least two respects, deepens a well-recognized and mature circuit split, and warrants this Court's review.

First, by holding BNSF's challenge forfeited even though the Board addressed the argument on the merits without questioning its timeliness, the D.C. Circuit's decision conflicts squarely with prior decisions of this Court recognizing that a court may not affirm agency action on a basis other than that invoked by the agency itself, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and the corollary that a court must defer to an agency's waiver of its own rules of procedure, *see, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). Despite this Court's clear admonition, however, the circuits are now deeply divided: three circuits, including the influential D.C. Circuit, will entertain non-statutory administrative forfeiture arguments not relied upon by the agency; at least five other circuits have properly concluded that they may not.

Second, even if it were appropriate for a federal court to *sua sponte* consider a supposed procedural bar to an argument resolved by the agency on its merits, the D.C. Circuit's forfeiture holding would still be fundamentally flawed. By holding BNSF's challenge forfeited based on nothing more than the court's own subjective sense of administrative timeliness—not tied to any statute, rule, or agency practice—the decision assumes for the judiciary the very common-law-making power that this Court flatly repudiated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), and reintroduces a harmful uncertainty and confusion about the operation of fundamental principles of administrative law that had been settled for decades. The D.C. Circuit, with its disproportionate jurisdiction over agency action, has adopted an approach to

administrative forfeiture that threatens to fundamentally disrupt the balance Congress has struck between an agency's authority to fashion and implement its own rules of procedure and the limited role of a reviewing court.

This is an appropriate vehicle through which to resolve the questions presented. The court's holding barred petitioner's primary challenge to an unprecedented Board order imposing what the Board itself estimated to be more than $300 million in reparations and future rate relief. And the underlying statutory question that the D.C. Circuit avoided—whether 49 U.S.C. § 11701's three-year automatic dismissal provision applies to complaint proceedings such as these—is an important one in its own right. The Board's interpretation of that statutory command is contrary to both its plain text and the legislative history, and undermines Congress's policy decision to grant carriers repose as to the lawfulness of their rates if a complaint is not resolved within three years. That substantial question was left unresolved by the D.C. Circuit based on a fundamentally misguided forfeiture holding that deepens a mature and apparently intractable circuit split. The petition for certiorari should be granted.

Statutory Background

The Board succeeded the Interstate Commerce Commission ("ICC") as the federal agency charged by Congress with economic regulation of the freight railroad industry. The Board's regulatory jurisdiction over railroad rates, however, is quite limited. It may initiate an administrative proceeding to review rates charged by a railroad *only* if the railroad has "market dominance." *See* 49 U.S.C. §§ 10701(d)(1), 10704(a)-(b),

10707(b). If the Board determines that it has jurisdiction over the challenged rate, it must decide whether the rate is "reasonable." *Id.* § 10701(d)(1). If the Board finds the rate unreasonable, it "may prescribe" the maximum rate the railroad may charge going forward and may order reparations to compensate the complaining shipper for overcharges. *Id.* §§ 10704(a)(1), 11704(b).

Board investigations are subject to a statutory three-year time limit. *Id.* § 11701(c). In particular, § 11701(a) states that, except as otherwise provided, "the Board may begin an investigation under this part only on complaint," and § 11701(c) states that an investigative proceeding brought under subsection (a) "is dismissed automatically unless it is concluded by the Board ... by the end of the third year" after it was begun.

Relevant Facts and Proceedings Below

From 1984 to 2004, BNSF transported WFA's coal from the Powder River Basin ("PRB") in Wyoming to WFA's electric generating facility at Moba Junction, Wyoming, under a long-term contract. Under that contract, the transportation rate gradually decreased from $4 per ton in 1984 to $3 per ton in 2004. *See* App.24a. When the parties' efforts to negotiate a replacement contract were unsuccessful, BNSF established a common carrier rate of $6 per ton, which was "one of the lowest transportation rates any utility pays to acquire PRB coal," and "low on a dollar-per-ton basis" in comparison to rates paid by other utilities in the region. *Id.*

WFA nonetheless filed a complaint with the Board on October 19, 2004, asserting that the rate was unreasonable. *See* App.27a-28a. Even though "railroad

costs increased approximately 60% and demand for PRB coal production increased by 500%" during the life of WFA's contract with BNSF, WFA contended that its rate should be only $3.10—nearly 25% less than the initial contract rate negotiated in 1984. App.24a-25a. WFA sought over $20 million per year in rate relief through 2024. App.25a.

The parties completed their briefing to the Board in December 2005. In October 2006, the Board issued final rules in a separate rulemaking proceeding that modified the guideline that it applies to determine the reasonableness of coal-transport rates and directed that the new rules would be applied to pending cases, including WFA's case. The Board explained that applying the new rules to this case was not unfair because it would not upset "settled expectations." JA251.[1] Though WFA (unsuccessfully) challenged the application of the new rules to its case, *see BNSF Ry. Co. v. STB*, 526 F.3d 770, 784 (D.C. Cir. 2008) ("*Major Issues*"), it never asked the Board for the opportunity to modify its evidence or arguments in light of the new rules.

On September 7, 2007, forty-two days shy of §11701(c)'s three-year deadline, the Board issued a decision finding that WFA had failed to prove that BNSF's rates were unreasonable. *See* App.23a-31a ("*2007 Decision*"). However, despite its prior finding that it could fairly apply its new rules to this proceeding, the Board reversed course and offered WFA the opportunity to reopen the record and present

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[1] "JA---" refers to the Joint Appendix filed with the D.C. Circuit.

a revised case tailored to the new rules. App.25a-27a.[2] WFA accepted that offer on October 22, 2007, a few days after the three-year deadline had passed.[3] On July 14, 2008, in its first substantive brief in response to WFA's revised case, BNSF argued that the proceeding should be dismissed for extending beyond the statutory time limit provided in § 11701(c). JA512, 533-34. In reply, WFA did not suggest that any Board rule or precedent rendered BNSF's argument for dismissal untimely, but argued that it was wrong on the merits and that "equitable considerations" should prevent BNSF from prevailing on it in any event. JA578.

On February 18, 2009, the Board issued a new decision, this time finding BNSF's challenged rates unreasonably high and ordering more than $300 million in estimated rate relief. *See* App.32a-36a ("*2009 Decision*").[4] The Board rejected BNSF's argument for dismissal under § 11701 on the merits, citing Board precedent holding that (notwithstanding its plain text)

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[2] In its petition for reconsideration of the *2007 Decision*, filed October 22, 2007, BNSF pointed out that permitting the proceedings to continue would undermine the statutory scheme that is intended to "give railroads repose if cases are not determined within three years." JA452 (citing § 11701(c)).

[3] The D.C. Circuit's opinion twice states, incorrectly, that the parties agreed to a schedule that "would include time for additional discovery." App.9a, 16a. Although it should not matter either way, the parties actually agreed to a procedural schedule "that would *not* include time for additional discovery." JA478 (emphasis added).

[4] Even so, the Board acknowledged that "the challenged rates are among the lowest transportation rates any utility pays to receive PRB coal," and "appeared on their face to be commercially reasonable." App.33a.

"the 3-year timetable in [§ 11701(c)] does not apply to rate cases begun on complaint" and "applies only in those circumstances where the Board institutes a proceeding on its own initiative." App.36a. The Board did not suggest that BNSF's three-year statutory argument was untimely under Board rules or precedent.

In its petition for review of the Board's order, BNSF once again argued that § 11701(c)'s three-year limit applies to this case. Final Brief of Petitioner ("Pet'r D.C. Cir. Br.") 26-42, ECF No. 1222535. BNSF pointed out that the Board's interpretation of § 11701(c) as excluding all proceedings brought "on complaint" is textually untenable. Pet'r D.C. Cir. Br. 28-29. Subsection (c)'s three-year time limitation applies only to "formal investigative proceeding[s] begun by the Board *under subsection (a)*." 49 U.S.C. § 11701(c) (emphasis added). Subsection (a), in turn, authorizes the Board to initiate only one type of proceeding: those brought "on complaint." *Id.* § 11701(a). The statute, BNSF explained, is not susceptible to the Board's reading—which excludes from subsection (c)'s scope the *only* type of proceeding actually mentioned in subsection (a). And the statutory history confirms this conclusion. Pet'r D.C. Cir. Br. 29-32.

Moreover, BNSF explained that—contrary to the Board's suggestion—enforcement of § 11701(c)'s unambiguous command in this case would not offend due process. Pet'r D.C. Cir. Br. 33-42. The Board was not required to provide WFA a second bite at the apple after the Board found in September 2007 that WFA failed to prove BNSF's rates unreasonable, because the Board had given WFA ample notice and opportunity to

request leave to file evidence bearing on the new standard when the Board informed WFA in February 2006 that the new rules would apply to its case. *See Major Issues*, 526 F.3d at 784.

BNSF argued that the Board's proceedings therefore terminated automatically as of October 19, 2007—three years after WFA filed its complaint—with no finding that BNSF's rates are unreasonable and no order of reparations. At the same time, BNSF acknowledged that, if the Board's September 2007 decision were treated as a final decision, then the later proceedings could be construed as a reopening, restarting the three-year statutory clock and preserving the possibility of *prospective* relief for the shippers. Pet'r D.C. Cir. Br. 43-44.

The Board and WFA's briefs responded to BNSF's dismissal argument at length on the merits, but nowhere suggested that BNSF had forfeited the argument by raising it too late before the Board. *See, e.g.*, Joint Brief of Respondents STB and United States 28-48, ECF No. 1222549; Joint Brief of Intervenors 23-28, ECF No. 1222245. Although the Board had thus never questioned the timeliness of BNSF's statutory three-year argument—during the administrative proceedings, in its final decision, or in its brief in the court of appeals—the court *sua sponte* raised a timeliness concern a few days before the oral argument. The court ordered the parties to address at oral argument whether BNSF forfeited its statutory dismissal argument and whether the Board in turn "forfeited its right to rely on such forfeiture (if any) by failing to argue the issue on appeal." App.55a. At oral argument, BNSF explained that it raised its argument timely before the Board and that, in any event, the

Board twice forfeited any timeliness objection—first through its "consideration of the issue on the merits" and its "failure to raise untimeliness" below, and again by declining to raise it on appeal. App.63a-66a (citing, *e.g.*, *Chenery* and *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001)).

The court ultimately granted BNSF's petition for review in part so that the Board could address on remand one of BNSF's objections to the Board's application of its rate reasonableness guidelines. But it declined to reach BNSF's statutory dismissal argument, holding that BNSF had forfeited that argument by failing to raise it sooner before the Board. The court so held even though BNSF had raised the argument within the time contemplated by the Board's rules, the Board had addressed the argument on its merits, and neither the Board nor WFA had argued—before the Board or in their briefs on appeal—that BNSF's challenge was untimely.

Although the court of appeals recited this Court's instruction in *United States v. L.A. Tucker Truck Lines, Inc.*, 34 U.S. 33, 37 (1952), that reviewing courts should refrain from considering arguments that were not raised before the administrative agency "'at the time appropriate *under [the agency's] practice*,'" App. 15a (emphasis added), it did not even pretend to rely on the Board's "practice" for its forfeiture holding. The court acknowledged that, under Board rules, BNSF was allowed to "fil[e] a motion to dismiss at any point in the WFA proceeding, *see* 49 C.F.R. § 1111.5," App.16a, but nonetheless ruled that BNSF had "stood silent before the Board" for too long, App.16a-17a. The court concluded that "BNSF did not timely present the three-year limit argument to the Board," even though

BNSF had raised the argument in its first substantive filing in response to WFA's revised case, once the three-year limitations period had actually run. App.17a.[5] And the court concluded that it could *sua sponte* reject BNSF's challenge as untimely—*i,e.*, that the Board had not forfeited the forfeiture—because the Board had ruled against BNSF on the merits. *See id.* ("The Board never acquiesced in BNSF's view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected BNSF's argument on the merits when it was first raised in July 2008.").

BNSF filed a petition for panel or en banc rehearing, arguing that the court erred in affirming the Board's action on a ground not relied on by the Board and by imposing its own rule of administrative forfeiture upon the Board's proceedings. The court of appeals denied rehearing on September 2, 2010. App.57a-58a.

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[5] *BNSF Railway Co. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) ("*Xcel*"), cited by the panel, does not address the questions presented here. In *Xcel*, the three-year statutory argument was raised for the first time in a footnote in a petition for reconsideration of a final Board decision, and the Board consequently *did not* address it on the merits. On appeal, the Board argued that it had not been timely raised. The D.C. Circuit agreed, reasoning that the Board was *prohibited by statute* and Board precedent from addressing the argument because it was first raised on reconsideration *after* a final Board decision. *Id.* at 479 (explaining that "the criteria for granting reconsideration are *limited by statute*" and the "*Board* 'generally does not consider new issues raised for the first time on reconsideration'") (emphases added) (citation omitted). Thus, in *Xcel*, unlike here, the court plainly did not impose its *own* preferred timeliness procedures. It simply affirmed the Board's determination that the argument had not been timely raised.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision has deepened a recognized and entrenched circuit split concerning an important and recurring question of law: whether a federal court may refuse to consider a party's argument challenging agency action based on an administrative forfeiture, when the agency itself did not find forfeiture and ruled on the merits of the argument. At least five circuits have concluded that they may not, and others have indicated that they share that view. Those courts have sensibly applied this Court's admonition in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that agency action must be affirmed, if at all, on a basis proffered by the agency. Those circuits also recognize the inherent unfairness of requiring litigants to "suddenly ... defend [in federal court] a claim of untimeliness never before raised." *Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001). The D.C. Circuit and two other circuits disagree. In those circuits, an agency may spring an administrative forfeiture argument upon the parties for the first time on appeal or—as in this case—a federal court may avoid a substantial statutory challenge to agency action based on a forfeiture argument not relied upon by the agency.

The D.C. Circuit compounded its error in this case by fashioning and applying its own, apparently subjective, rule of administrative forfeiture, not grounded in statute, rule, or agency practice, in square conflict with this Court's decision in *Vermont Yankee*, thereby creating uncertainty in an area of administrative law that had been settled for decades.

The decision below fundamentally misapprehends the respective roles of courts and administrative

agencies by purporting to affirm the Board's action on a rationale not proffered by the Board and by usurping the agency's prerogative to fashion its own procedures and decide whether and to what extent to waive them. These are issues of national importance, over which the D.C. Circuit wields disproportionate influence. This Court should grant certiorari to resolve the circuit conflict and restore clarity to these once-settled rules of administrative law.

I. THE D.C. CIRCUIT'S AFFIRMANCE OF AGENCY ACTION ON NON-STATUTORY PROCEDURAL GROUNDS NOT RELIED UPON BY THE AGENCY DEEPENS A WELL-RECOGNIZED AND MATURE CIRCUIT SPLIT

Under *Chenery* and its progeny, this Court has long adhered to the "simple but fundamental rule of administrative law" that a court is "*powerless* to affirm ... administrative action by substituting what it considers to be a more adequate or proper basis." 332 U.S. at 196 (emphasis added); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (courts "*may not* affirm on a basis containing any element of discretion ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[W]e *may not* supply a reasoned basis for the agency's action that the agency itself has not given.") (emphasis added). Thus, "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)).

For the same reason, the courts "*may not* accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines*, 371 U.S. at 168 (emphasis added).[6]

This Court has recognized that the admonition of *Chenery* applies with equal force whether the alternative rationale is substantive or procedural; it is the province of the administrative agency not only to fashion rules of procedure, but also to decide whether and to what extent to waive them. *See Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (ICC may "relax or modify" its own procedures).

Nevertheless, a pronounced circuit split has developed as to whether a reviewing court may avoid addressing a party's argument on the merits by affirming the agency's decision on (non-statutory) procedural grounds not relied upon by the agency.[7] By

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[6] *See also Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 297 (1945) ("If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it.").

[7] Of course, a court may (indeed, *must*) determine that it has statutory jurisdiction to entertain a challenge to agency action even if the agency overlooks a potential jurisdictional defect. *See, e.g.*, 16 U.S.C. § 825*l*(a)-(b) (requiring litigant to file rehearing petition before challenging FERC decision in federal court); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) ("Neither FERC nor this court has authority to waive these statutory requirements."); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (party waived argument "by failing to present it to FERC as required by [the FPA]"). There is no such defect here.

answering that question in the affirmative, the D.C. Circuit joins the Fifth and Eighth Circuits in an entrenched conflict with the Third, Seventh, Ninth, Tenth, and Federal Circuits.[8] The lower courts and at least one commentator have acknowledged this conflict. *See, e.g.*, *Ester*, 250 F.3d at 1071 (Flaum, C.J., and Easterbrook and Williams, JJ.) ("[T]he courts of appeals that have considered the issue have not produced uniform results."); *Eneje v. Keisler*, 251 F. App'x 154, 154 n.* (4th Cir. 2007) (recognizing split); *Lewis v. Leavitt*, No. 1:07CV375, 2008 U.S. Dist. LEXIS 61502, at *11 (M.D.N.C. Aug. 8, 2008) (same); *Smith v. Danzig*, Civil No. 00-216-P-H, 2001 U.S. Dist. LEXIS 10262, at *33 (D. Me. July 20, 2001) (same); Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 489 (2002) (describing circuit split on whether appellate court may find administrative forfeiture "[w]hen an agency provides a final decision on the merits and there is no mention of untimely exhaustion of administrative remedies") (footnote omitted).

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[8] Prior D.C. Circuit decisions were murky on this question. *See* Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 504-05 (2002) (observing that the D.C. Circuit had "developed an unreliable and unnecessarily ad hoc jurisprudence" that "fails to provide a definitive answer to whether the administrative agency waives the untimeliness defense when it is not raised at the administrative level").

A. Two Other Circuits Will Affirm Agency Action Based On An Administrative Forfeiture Not Found By The Agency

Fifth Circuit. The Fifth Circuit will affirm agency action on administrative forfeiture grounds unless the agency made a "specific finding" of timeliness below or rendered a *favorable* decision on the merits of a party's claim. *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992). In *Rowe*, a suspended agency employee filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC rejected the complaint and an untimely request for reconsideration. Later, the Fifth Circuit affirmed a district court's holding that the employee's administrative motion for reconsideration was untimely and therefore did not toll the statutory deadline for filing his Title VII lawsuit—which, consequently, was also untimely. The Fifth Circuit held that the EEOC did not waive any timeliness objection by "docketing and acting on [the employee's] request for reconsideration" because the EEOC made no explicit finding of timeliness. *Id.* Indeed, the court explained that even a statement by the EEOC that the "request for reconsideration is timely" would not have "suffic[ed] 'because agencies may inadvertently overlook timeliness problems and should not thereafter be bound.'" *Id.* (citation omitted). *See also Munoz v. Aldridge*, 894 F.2d 1489, 1495 (5th Cir. 1990) ("If an agency makes a specific finding during the administrative process that the administrative complaint was timely, it cannot later defend against a civil complaint by arguing that the administrative complaint was untimely."); *Oaxaca v. Roscoe*, 641 F.2d

386, 390 (5th Cir. Unit A Apr. 3, 1981) (holding that government waives timeliness when "agency has in fact *made a finding of discrimination*") (emphasis added).

Eighth Circuit. In *Otter Tail Power Co. v. STB*, the court held that a party waived an argument by raising it "fatally late" before the STB, 484 F.3d 959, 963 (8th Cir. 2007), even though the agency had resolved the issue on its merits, *see Otter Tail Power Co. v. BNSF*, STB Docket No. 42071, 2006 WL 275904, at *24 (S.T.B. Jan. 27, 2006). The court reasoned that, because the opposing party "had no opportunity to investigate or respond to the [late] challenge nor did the Board have the opportunity to receive evidence relating to [the] challenge," allowing the challenge "would violate the exhaustion rule's principle of '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants ....'" *Otter Tail Power Co.*, 484 F.3d at 963 (quoting *L.A. Tucker Truck*, 344 U.S. at 37).

B. At Least Five Circuits Properly Refuse To Find An Administrative Forfeiture Where The Agency Reached the Merits Without Finding Forfeiture

The Third, Seventh, Ninth, Tenth, and Federal Circuits have squarely held that a court may not refuse to address an argument challenging agency action based on an administrative forfeiture when the agency itself did not find forfeiture and decided the argument on its merits. Two other courts of appeals have indicated in dicta (and/or holdings in unpublished decisions) that they agree.

Seventh Circuit. In *Ester*, the Veterans Administration ("VA") "ruled on the merits of [the plaintiff's employment discrimination] claims without addressing [his] failure to timely file his formal complaint." 250 F.3d at 1073. In its answer in the plaintiff's subsequent Title VII suit, the VA argued for the first time that the plaintiff's complaint before the agency was untimely. The district court agreed and granted the VA summary judgment on that ground. The Seventh Circuit reversed. Citing this Court's decisions in *L.A. Tucker Truck* and *Chenery*, the Seventh Circuit held that, "when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Id.* at 1071-72. The court explained that, "[i]f an agency indeed believes that a particular complaint is untimely, then the agency needs to state that reason as the one (or as one of many) for its administrative action." *Id.* at 1072. Further, the court reasoned, "values of judicial economy" and "agency autonomy" are served by "requiring objections—even those objections possessed by the agency itself—to be raised in the agency proceeding." *Id.* And, the court pointed out, that rule avoids significant prejudice to "plaintiffs who suddenly must defend [in federal court] a claim of untimeliness never before raised." *Id.* Finally, the court analogized to the federal/state habeas context in which state procedural bars expire if the last state court "'reaches the merits'" of a given federal claim. *Id.* at 1073 (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)). *Accord Abdelqadar v. Gonzales*, 413 F.3d 668, 670-71 (7th Cir. 2005) (holding that an agency "excuse[s] an alien's failure to exhaust a particular issue" by addressing it on the merits (applying *Salfi*)).

Federal Circuit. In *Hall v. Department of Treasury*, the Federal Circuit "ch[o]se to follow the guidance of the Seventh Circuit" in *Ester*, and likewise held that "an agency waives its timeliness defense when it decides the merits of a complaint without addressing the question of timeliness." 264 F.3d 1050, 1061 (Fed. Cir. 2001). There, a Treasury Department employee in the mid-1990s asked the agency to retroactively credit his years of service, stretching back to 1979, toward the total needed to qualify for an increased retirement benefit. Although an agency regulation limited such credit to the year preceding any such request, the Treasury Department nonetheless considered the employee's request for the entire time period and rejected it on the merits. The court found that the agency had thereby waived any right to rely on its time limitations on appeal. *Id.* at 1061-62. The Federal Circuit has since reaffirmed that position. *See, e.g., Jorge v. Dep't of Treasury*, 19 F. App'x 892, 899 (Fed. Cir. 2001); *Labrada v. Dep't of Treasury*, 19 F. App'x 883, 891 (Fed. Cir. 2001); *see also Turner v. Merit Sys. Prot. Bd.*, 806 F.2d 241, 246 (Fed. Cir. 1986) ("Waiver of the time limit ... is committed to the Board's discretion and we will not substitute our judgment for that of the Board.").

Ninth Circuit. In *Abebe v. Gonzales*, the Board of Immigration Appeals ("BIA") had adopted the decision of an immigration judge, denying petitioner's application for asylum. 432 F.3d 1037 (9th Cir. 2005) (en banc). On appeal, the government argued that the petitioner had forfeited one of his arguments before the BIA. The Ninth Circuit, sitting en banc, rejected the government's argument. The court held that it may not avoid consideration of an issue on administrative

forfeiture grounds when the agency "has ignored a procedural defect and elected to consider an issue on its substantive merits." *Id.* at 1041 (citing *FPC v. Texaco Inc.*, 417 U.S. at 397 (in turn quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69)).

Tenth Circuit. In *Sidabutar v. Gonzales*, the Tenth Circuit held that an agency waives compliance with its own procedural requirements when it "issue[s] a decision considering the merits of an issue, even *sua sponte*." 503 F.3d 1116, 1121 (10th Cir. 2007). Although the petitioner had failed to challenge the immigration judge's ruling in its appeal to the BIA, the BIA waived its own requirement that an issue be "specifically" raised in the notice of appeal by considering the issue on its merits. *Id.* at 1120. The Tenth Circuit explained that agencies are "'free to fashion their own rules of procedure,'" and that a federal court's "role is not to substitute [its] own preference ... for the agency's determination of its internal rules." *Id.* (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940), and citing *Salfi*). Accordingly, "[w]here the BIA determines an issue administratively-ripe to warrant its appellate review, [the court] will not second-guess that determination." *Id.* "The failure to consider" the petitioner's claims on the merits, the court observed, "'would come at the cost of respect for the agency's own judgment regarding its ground for decision,'" and "would amount to a judicial determination that the Board acted *ultra vires* in following its own rules." *Id.* (citation omitted).

Third Circuit. In *Bin Lin v. Attorney General*, the petitioner failed to specify a particular issue in appealing an immigration judge's decision to the BIA, as required by BIA regulations. 543 F.3d 114 (3d Cir.

2008). Adopting much of the Tenth Circuit's reasoning in *Sidabutar*, the Third Circuit held that an agency "waive[s] compliance with [a procedural] requirement by choosing to address [a] petition on the merits" and that the federal courts, therefore, "may not ... reject the petition for review based on that [procedural] requirement." *Id.* at 125.

Other Circuits. Considered reasoning in decisions of the Second and Sixth Circuits indicates that those courts agree with *Ester* and would refuse to find an administrative forfeiture in circumstances such as those present here. For example, in *Bruce v. United States DOJ*, the Second Circuit explicitly agreed with *Ester*'s conclusion that an agency forfeits any timeliness objection by "issu[ing] a final decision on the merits" without addressing timeliness "until the complainant filed suit in federal court." 314 F.3d 71, 74-75 (2d Cir. 2002). Although the court ultimately relied on the agency's "specific finding of timeliness" in finding agency waiver, it determined *Ester* to be "good law." *Id.* at 75. *See also Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (noting that an agency waives its timing rules "when the agency decides the complaint on the merits without addressing the untimeliness defense") (citing *Ester*); *Momah v. Dominguez*, 239 F. App'x 114, 121 (6th Cir. 2007) (holding that "the [agency] waived its untimeliness defense by addressing the merits ... at the administrative level without raising a timeliness objection") (citing *Ester*).

II. THE D.C. CIRCUIT FOUND A FORFEITURE BASED ON ITS OWN SUBJECTIVE NOTION OF ADMINISTRATIVE TIMELINESS, IN SQUARE CONFLICT WITH THIS COURT'S PRECEDENTS

The D.C. Circuit's opinion also conflicts with this Court's precedents by asserting a judicial common-law-making authority to fashion and impose administrative forfeiture rules that are different from, or in addition to, those devised by the agency itself.

It has long been settled that a reviewing court will not consider an argument that was not raised before the agency "at the time appropriate under [the agency's] practice." *L.A. Tucker Truck*, 344 U.S. at 37. That principle reflects the agency's power and responsibility to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143, which this Court has held should be "left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Vt. Yankee*, 435 U.S. at 524.

In *Vermont Yankee*, this Court clarified that a court must not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. And, this Court has since reiterated that "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements" divorced from any statutory or regulatory requirement. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) (rejecting lower court's reliance on "fundamental fairness" in attempting to craft procedural requirements).

Together, the principles articulated in *L.A. Tucker Truck* and *Vermont Yankee* prohibit a reviewing court from substituting its judgment for the agency's concerning the timeliness of objections raised before the agency.

The D.C. Circuit's decision in this case, however, does just that, hearkening back to the heady days before *Vermont Yankee* when that court felt empowered to prescribe its own notions of proper agency procedures. *See generally* Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359 (1978) (discussing prior D.C. Circuit case law and noting that it was "in the process of replacing the rudimentary procedural mandates of the [APA]" and crafting an "'ever-growing common law'") (citation omitted). Here, Congress made the judgment—in keeping with its decision to ease the strictures governing railroad carriers—that a Board investigation must be dismissed if it extends beyond three years. And, the agency entrusted by Congress to make vital, multi-million-dollar rate decisions has a rule explicitly permitting a motion to dismiss to be raised at "anytime during a proceeding." 49 C.F.R. § 1111.5. The agency, following that rule, addressed BNSF's argument that the proceeding must be dismissed for extending beyond the statutory three-year period. The agency did not suggest in its decision that BNSF's challenge was untimely. Under *Vermont Yankee* and its progeny, the D.C. Circuit was not empowered to decree otherwise; it must leave it to the agency to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143. Other circuits have recently reiterated this bedrock

principle. *See, e.g.*, *Bin Lin*, 543 F.3d at 125; *Sidabutar*, 503 F.3d at 1120.

The D.C. Circuit averred to this Court's admonition in *L.A. Tucker Truck* (App.15a), but, disregarding *Vermont Yankee*, it proceeded to fashion and apply its own, apparently subjective, rule of administrative waiver, not grounded in statute, rule, or agency practice. As the court's opinion acknowledges, BNSF raised its argument for dismissal under § 11701(c) seven months before the Board issued its final decision, and the Board's own regulations provide that a motion to dismiss may be brought before the Board "at anytime" during the proceedings. 49 C.F.R. § 1111.5. The court pointed to no statute, rule, or agency practice that would have required BNSF to raise the argument sooner than it did. Indeed, it is plain that the Board itself believed the argument *was* timely. The Board addressed the argument on the merits without a word about the timing, and it did not suggest any problem with BNSF's timeliness in its brief to the court of appeals. The D.C. Circuit's decision thus presents a direct challenge to one of this Court's most fundamental holdings on the limits of judicial power. Although petitioner believes that the D.C. Circuit's decision merits plenary review, its error is sufficiently egregious to warrant summary reversal.

This error cannot be dismissed as an aberrant decision by a rogue panel. In *J.J. Cassone Bakery, Inc. v. NLRB*, the D.C. Circuit similarly held that a party forfeited an argument because it was "not timely presented to the Board" without basing that decision on any statute, rule, or agency precedent. 554 F.3d 1041, 1046 (D.C. Cir. 2009). The court observed that the party had missed several earlier opportunities to

raise the argument, but cited nothing—apart from the court's own notions of fairness and efficiency—that would have *required* the party to raise the argument at the earliest opportunity. *Id.* at 1043-44. In finding an administrative forfeiture, the court relied on pre-*Vermont Yankee* circuit precedent. *See id.* at 1044 (citing *Marcus v. Director*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)). And, in this case, the D.C. Circuit denied rehearing en banc on this issue. App.59a-60a.

III. THE QUESTIONS PRESENTED ADDRESS FREQUENTLY RECURRING ISSUES OF NATIONAL IMPORTANCE

The first question presented raises an important and frequently recurring issue of administrative law, on which the decision below deepens a recognized and entrenched circuit conflict. The related, second question presented also warrants this Court's plenary review. The D.C. Circuit's ad hoc determination that BNSF should have raised its argument at some earlier time and therefore "forfeited" the argument at the agency level is flatly contrary to fundamental principles of administrative law recognized by this Court and upsets the fundamental balance that Congress struck between agency authority and federal court review. As this Court stressed in *Vermont Yankee*, the specter of the courts "impos[ing] additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant ... granting certiorari." 435 U.S. at 535 n.14. *See also Pension Benefit Guar. Corp.*, 496 U.S. at 644 (certiorari granted due to the "significant administrative law questions raised by this case").

Moreover, the identity of the court below argues for immediate review. The D.C. Circuit—with its

nearly ubiquitous jurisdiction over administrative agencies—inevitably exerts disproportionate influence on the other courts and the agencies themselves. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006) (noting that "[o]ne-third of the D.C. Circuit appeals are from agency decisions" whereas "[t]hat figure is less than twenty percent nationwide"); *see also id.* at 389 ("Whatever combination of letters you can put together [in an agency's name], it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is ... lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits."); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 Geo. L.J. 779, 779 (2002) (noting that "the D.C. Circuit has long dominated and played a major role in shaping" administrative law).

As this Court explained in *Vermont Yankee*, review of an administrative decision of the D.C. Circuit may be especially warranted because "the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit], the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." 435 U.S. at 535 n.14; *see also* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 Geo. Wash. L. Rev. 553, 562 (2010) (noting that this Court has historically "prioritized review of the D.C. Circuit's administrative law").

The D.C. Circuit has here "unjustifiably intruded into the administrative process," and this Court's guidance is again needed to prevent "'judicial intervention run riot.'" *Vt. Yankee*, 435 U.S. at 556-57 (citation omitted).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument or summarily reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

BNSF RAILWAY COMPANY, Petitioner

v.

SURFACE TRANSPORTATION BOARD and United States of America, Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc., Intervenors.

Nos. 09-1092, 09-1190, 09-1234.

Argued Feb. 18, 2010.
Decided May 11, 2010.

604 F.3d 602

Before: HENDERSON, ROGERS and GARLAND, Circuit Judges.

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

BNSF Railway Company ("BNSF") petitions for review of the decision of the Surface Transportation Board ("Board") that rates challenged in 2004 by Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (hereinafter, collectively, "WFA") are unreasonably high maximum reasonable rates, prescribing future maximum rates, and ordering

BNSF to pay reparations.[1] BNSF contends that the Board's decision was contrary to law because the three-year limit in 49 U.S.C. § 11701(c) had expired before its February 17, 2009 Decision, and so the Board's orders prescribing maximum reasonable rates and ordering the payment of reparations must be vacated and the proceeding dismissed. Alternatively, BNSF contends there was a reopening after the Board's September 7, 2007 Decision,[2] and hence any reparations would be limited from that time forward. On the merits, BNSF contends the Board was arbitrary and capricious by allowing WFA to revise its traffic route in response to the Board's adoption of new retroactive methodologies for calculating rates, and by modifying the average total cost methodology for allocating revenue from cross-over traffic.

We hold BNSF forfeited the statutory argument by failing to raise it in a timely manner before the Board. On the merits, we conclude that BNSF's challenge to traffic rerouting is unpersuasive and a matter within the Board's expertise, and that a remand is required for the Board to address BNSF's objection to the modified average total cost methodology as biased

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[1] BNSF petitions for review of three Board decisions: The February 17, 2009 Decision, as modified by the June 3, 2009 Decision, and the July 23, 2009 Decision on BNSF's compliance. *See W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 415499 (Feb. 17, 2009); *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 1567606 (Jun. 3, 2009); *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 2221011 (July 23, 2009).

[2] *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2007 WL 2590251 (Sept. 7, 2007) ("September 2007 Decision").

because it double counts variable costs; otherwise we affirm. Accordingly, we grant the petitions in part and deny the petitions in part.

I.

A.

In the Interstate Commerce Commission Termination Act of 1995, Pub.L. 104-88, 109 Stat. 803 (1995) ("ICCTA"), Congress carried forward the shipper protections in the Staggers Rail Act of 1980, Pub.L. 96-448, 94 Stat. 1895 (1980), while continuing the deregulation of the railroad industry it had previously endorsed in the Staggers Act and the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (1976). *See* H.R. Conf. Rep. 104-422 (1995), at 194, *reprinted in* 1995 U.S.C.C.A.N. 850; S.Rep. No. 104-176 (1995), at 2-3, 5-6; H.R.Rep. No. 104-311 (1995), at 82-83, *reprinted in* 1995 U.S.C.C.A.N. 793. Thus, a party may file a complaint with the Board, which succeeded the Interstate Commerce Commission ("I.C.C.") as the regulator of the rail industry, challenging the reasonableness of a rate. 49 U.S.C. §§ 11701(b), 10704(b). The Board, upon determining that it has jurisdiction, *id.* §§ 10701(d)(1), 10707(b)-(c), which covers only those railroads that possess "market dominance,"[3] must consider the system-wide pricing policies, *id.* § 10701(d)(2)(A)-(C), and ensure the rail carrier has the opportunity to earn "adequate revenues," *id.* § 10704(a)(2). If the Board finds the challenged rate unreasonable, it "may prescribe" the maximum rate the railroad can charge

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[3] A railroad has "market dominance" if its revenues meet or exceed 180 percent of its variable costs for the traffic to which the rate applies. 49 U.S.C. § 10707(d)(1)(A).

going forward, *id.* § 10704(a)(1), and the railroad "is liable" for reparations to the complainant, *id.* § 11704(b).

The complexity of railroad rate regulation stems in part from determining the proper attribution of costs to those using the railroad's services and facilities. In 1985, the Board promulgated guidelines to calculate rates for shipping coal. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) ("*Guidelines*"), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir.1987). The *Guidelines* approach, which was extended to non-coal rates, adopted Constrained Market Pricing ("CMP"), in which rates are set in inverse proportion to shippers' respective demand elasticities, so called "Ramsey pricing." *Guidelines* at 547-48. Under CMP, rates are limited to what is necessary for the carrier to earn adequate revenues based on efficient management and pricing practices. *Guidelines* at 534-42. This determination is made in part based on the stand-alone-cost ("SAC") of a hypothetical carrier or "stand-alone railroad" ("SARR") designed by the complainant to be optimally efficient in providing those lines and facilities needed to serve the complaining shipper. The SAC test determines the maximum rate that the railroad may charge the traffic group by accounting for all the costs of running the SARR, including the cost of building and operation and a reasonable return on investment. Under this test the Board had, over the years, applied Modified Straight-Mileage Prorate ("MSP"), a mileage-based revenue allocation procedure. *See BNSF Ry. Co. v. STB*, 453 F.3d 473, 483-84 (D.C.Cir.2006) (hereinafter "*Xcel*").

In October 2006, the Board revised the *Guidelines* approach upon concluding the regulatory proceedings had become too complex and too costly. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (Oct. 30, 2006) at 3 ("*Major Issues Rulemaking*"). Previously, the Board had used the "percent reduction" method, by which it reduced the challenged rate by the same percentage by which the total revenues exceeded the SAC costs. In the final rule, the Board changed how it would evaluate rate reasonableness by adopting the Maximum Markup Methodology ("MMM")[4] and the Average Total Cost ("ATC") methodology.[5] This court upheld the final

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[4] Under MMM, the parties calculate the revenue-to-variable cost ("R/VC") needed to cover the SARR's total costs in one year to determine the Benchmark R/VC Ratio. The Board then compares the Benchmark R/VC Ratio to the actual R/VC ratio for each shipper in the traffic group on the SARR to determine if the SAC costs assigned to that shipper's traffic would exceed what the SARR could charge the shipper for the traffic. "Where the actual charge is less than the share of SAC costs that would otherwise be allocated" to a particular shipper under the Benchmark R/VC ratio, "the difference should be reapportioned to the remaining traffic group" and this should be repeated "until no movement in the traffic group is assigned a higher share of the SAC costs than its actual charge." *Major Issues Rulemaking* at 14.

[5] To allocate revenues for cross-over traffic between the defendant railroad and the SARR, the Board abandoned MSP, which it had used for over a decade, *see Xcel*, 453 F.3d at 484. According to this court, the "critical flaw" in this procedure was that it failed to account for "'economies of density'—the principle that the more traffic on a given stretch of rail, the lower the average cost (and hence the lower the cross-over-traffic revenue that should be attributed to it)." *Major Issues Appeal*, 526 F.3d at 782-83 (citing *Xcel*, 453 F.3d at 473). To address the economies of density and "the fact that at some point, higher density no longer results in lower average costs," *id.* at 783, the Board adopted ATC

rule, including its retroactive application. *See BNSF Ry. Co. v. STB*, 526 F.3d 770 (D.C.Cir.2008) ("*Major Issues Appeal*").

B.

From 1984 to 2004, BNSF transported WFA's coal under a long-term contract in which the rate gradually decreased from $4 per ton in 1984 to $3 per ton in 2004. When the contract expired, BNSF and WFA were unable to reach a new agreement and BNSF set a common carrier rate of $6 per ton. Although this rate was, due to the proximity to the Powder River Basin, "one of the lowest transportation rates any utility pays to acquire PRB coal," September 2007 Decision at 2, the revenue to variable cost ratio for these movements was very high, beginning at 481 percent and adjusting upward over time to 843 percent according to WFA.

On October 19, 2004, WFA filed a verified complaint with the Board, seeking to demonstrate the unreasonableness of BNSF's rates under the SAC test. WFA designed a SARR called the Laramie River Railroad ("LRR"), which contained some cross-over traffic and allocated revenues from the crossover traffic using MSP. BNSF filed an answer and the Board granted a motion allowing mediation to continue through January 31, 2005. Once mediation efforts ended, the parties filed evidentiary presentations and in December 2005 they filed final briefs in accordance

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"to derive a system-average fixed cost per route mile," *Major Issues Rulemaking* at 34. Average fixed cost is added to average variable cost to set the average total cost per ton. *Id.* To determine the proper allocation of revenues for the segment, the Board divides the average total cost of the segment by the average total cost of the railroad system. *Id.*

with a briefing schedule that had been extended a number of times.

Then, in February 2006 the Board held in abeyance the pending WFA and AEP Texas North Company ("AEP") proceedings while it conducted the *Major Issues Rulemaking*. At the time, the Board announced its intent to apply to the pending cases whatever new methodology it adopted in three areas, including cross-over traffic. It also stated that at the end of the rulemaking parties in the pending cases would be afforded an opportunity to submit supplemental evidence comporting with changes adopted in the rulemaking, and that "the time frames for issuing a Board decision in those two cases are tolled." *Notice of Proposed Rulemaking*, STB Ex Parte, No. 657 (Sub-No. 1) (Feb. 26, 2006) ("*NPRM*") at 3; *see* 49 U.S.C. § 10704(c) (requiring the Board to issue a decision within 90 days of the close of the record). In October 2006, the Board promulgated the final rule replacing the percentage reduction methodology with MMM and the mileage-based revenue allocation methodology ("MSP") with ATC. *See Major Issues Rulemaking* at 14, 31. On November 8, 2006, the Board ordered the parties to submit supplemental evidentiary presentations, based on the existing SARR proposal, so the Board could apply the new methodologies; the parties completed their supplemental filings by April 2007.

In the September 2007 Decision, *supra* note 2, the Board found that BNSF has market dominance over the transportation at issue. It also found that WFA had failed to establish "on this record" that the challenged rates are unreasonably high, *id.* at 3, but offered WFA an opportunity to submit supplemental

evidence bearing on the new retroactive methodologies. Noting the warning of this court, *see supra* note 5, the Board rejected the idea of continuing to apply "flawed or discredited procedures" while concluding that "fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology." September 2007 Decision at 20. The Board stated: "Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions"; however, "[i]n this case, ... the change from MSP to ATC would affect the basic design of a SAC case" because WFA might not have included all of the traffic offering limited revenue contribution or might have changed the configuration of the LRR under ATC. *Id.* The Board gave WFA thirty days to decide, allowing WFA to increase or decrease the traffic group and change the configuration of the LRR and to submit evidence on all related issues. The Board stated it "will discontinue this proceeding" if WFA does not seek to present new SAC evidence. *Id.*

Upon denying the parties' petitions for reconsideration, the Board explained further that "WFA could have been unfairly prejudiced by not knowing when it designed the LRR that the ATC revenue allocation procedure would be applied to its case." February 2008 Denial of Reconsideration at 2.[6] In response to BNSF's argument that there was nothing unfair about applying ATC to WFA's case, the Board emphasized that "[u]sing ATC rather than MSP changes the incentives for a shipper in the selection of

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[6] *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2008 WL 542600 (Feb. 28, 2008) ("February 2008 Denial of Rehearing").

the traffic group to be used." *Id.* at 3. Acknowledging that allowing the supplemental evidentiary presentation "is an unusual measure," the Board cited cases to show "it is not unprecedented," *id.*, and noted that the parties had agreed to a procedural schedule through July 2008 that would include time for additional discovery.

In a supplemental evidentiary presentation filed on May 13, 2008, WFA redesigned its SARR to change LRR's traffic route to exclude some marginally profitable traffic and to include high revenue traffic destined for the WestStar Jeffrey Energy Center ("Jeffrey traffic"). BNSF, in reply of July 14, 2008, argued that the complaint should be dismissed because WFA's use of rerouted traffic was "inconsistent with the limited reopening right afforded by the Board" and a "blatant attempt to game the Board's new Maximum Mark-Up Methodology ('MMM')." BNSF July 2008 Reply at 5, 6. BNSF also renewed a double-counting objection to the modification of ATC adopted in the September 2007 Decision that it had raised in petitioning for reconsideration. And, for the first time, BNSF argued that the WFA proceeding would have to be dismissed in view of the three-year limit in section 11701(c), which, BNSF asserted, commenced with the filing of WFA's verified complaint of October 19, 2004 and the Board's initiation of a formal investigation on that date. *See id.* at 47-49. Alternatively, BNSF argued that the September 2007 Decision was a final decision, such that the extended WFA proceeding was a reopening and no reparations could be awarded for rates charged prior to that time, citing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389-90, 52 S.Ct. 183, 76 L.Ed. 348 (1932).

In rebuttal of August 15, 2008, WFA noted that "[l]ong after the record initially closed in this case, the Board adopted several new SAC standards in [the] *Major Issues [Rulemaking]* and retroactively applied them," and that WFA had "repeatedly objected to the Board's actions, [arguing] that WFA[] would have modeled a different SARR had the new ... rule the Board adopted in [the] *Major Issues [Rulemaking]* to set SARR crossover traffic revenue divisions been in effect when it modeled the LRR." WFA August 2008 Rebuttal at 2-3. WFA also called the Board's attention to the due process requirements identified in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), that a complainant has the right to an "opportunity to present his case and have its merits fairly judged," and in *Hatch v. FERC*, 654 F.2d 825, 835 (D.C.Cir.1981), that where rules have changed in the middle of the case "litigants must have a meaningful opportunity to submit conforming proof." *See* WFA August 2008 Rebuttal at 65. WFA emphasized that BNSF had not objected to the procedural schedules advancing the proceeding to July 2008 and had stated in filings during the *Major Issues Rulemaking* that delay caused by the rulemaking would not prejudice WFA's case. *See id.* at 66.

In the Decision of February 17, 2009, *supra* note 1, the Board found that the challenged rates were unreasonable, prescribed maximum lawful rates, and ordered BNSF to pay reparations to WFA. In response to the parties' joint petition, the Board, by Decision of June 3, 2009, incorporated technical corrections to the February 2009 Decision. In the Decision of July 23, 2009, the Board found that although BNSF had generally used the correct method

to calculate the maximum lawful rates, it erred in its indexing approach, and ordered BNSF to establish rates, within thirty days, in accordance with the approach in *Oklahoma Gas & Elec. v. Union Pacific R.R.*, STB Docket No. 42111, 2009 WL 2205337 (July 23, 2009). BNSF petitions for review.[7] *See* 28 U.S.C. §§ 2321, 2342, 2344.

II.

BNSF contends that section 11701(c) required the Board to dismiss the WFA proceeding three years after WFA filed its verified complaint on October 19, 2004. The Board responds that this ignores statutory text in section 11701(a) that introduces ambiguity as to whether the three-year limit applies only to investigations initiated by the Board rather than by complaint, and would raise serious constitutional concerns because dismissal without a final decision on the merits would likely deprive complainants of due process. WFA concurs with the Board's interpretation of section 11701(c) and agrees application of the three-year limit to its complaint would violate its basic due process right to receive a final decision on its claim after a full and fair hearing.

Section 11701 provides:

> (a) *Except as otherwise provided in this part*, the Board may begin an investigation under this part only *on complaint*. If the Board finds that a rail carrier is violating this part, the Board shall take

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[7] On October 21, 2009, the Board ordered BNSF within thirty days to pay reparations (with interest) to WFA. *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 3398892 (Oct. 21, 2009).

> appropriate action to compel compliance with this part.
>
> (b) A person ... may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. * * * The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint ... because of the absence of direct damage to the complainant.
>
> (c) A formal investigative proceeding begun by the Board under subsection (a) of this section is *dismissed automatically* unless it is concluded by the Board with administrative finality by the *end of the third year* after the date on which *it* was begun.

49 U.S.C. § 11701 (emphasis added).

BNSF contends the plain text of section 11701(c) provides that the three-year limit applies only to "formal investigative proceeding[s] begun by the Board under subsection (a)." Pet'r's Br. 28. Subsection (a) authorizes the Board to initiate, BNSF maintains, only one type of proceeding: those brought on complaint. WFA filed a complaint and so, BNSF concludes, the three-year limit in subsection (c) applies to the WFA proceeding, commencing to run on the date WFA filed its complaint. BNSF notes that, in amending subsection (a) to strike text authorizing the Board's predecessor to begin an investigation under this subtitle "on its own initiative," 49 U.S.C. § 11701(a) (as recodified in 1978), Congress in the ICCTA cut back on the Board's authority to initiate formal investigations. *See* H.R. Conf. Rep. 104-422, at 194. BNSF rejects the notion that due process is implicated,

suggesting WFA's complaint is not a protected property interest and recasting WFA's "real objection" to be that the rules of the game changed after it filed its complaint in a way that prevented "fair" adjudication within the three-year limit, a claim under *Hatch* that BNSF maintains was rejected in the *Major Issues Appeal*, 526 F.3d at 784. *See* Pet'r's Br. 36-40. BNSF thus concludes, the WFA proceeding should have been terminated automatically pursuant to section 11701(c) on October 19, 2007 and the Board's subsequent orders should be vacated as contrary to law.

The Board does not suggest the deregulatory context is not a relevant indicator of Congress' intent, only that Congress' failure in the ICCTA to amend section (c) (other than making technical revisions) indicates that Congress intended the Board's interpretation—that the three-year limit applies only to Board-initiated investigations—to continue in force. It notes Congress' contemporaneous addition to subsection (a) of the phrase "except as otherwise provided in this part," such that the ICCTA did not disturb the Board's authority to initiate certain formal investigations under other provisions of Title 49, as, for example, to exercise temporary authority to direct rail operations in rail service emergencies pursuant to 49 U.S.C. § 11123. *See also id.* §§ 10745, 10706(d), 10502(b). Essentially, the Board maintains, as it did in *Xcel*, 453 F.3d at 478-79, that because Congress cannot have intended to punish a complainant for agency inaction, the three-year limit must be read to apply only to investigations begun by the Board on its own initiative. It thus reads "formal investigative proceeding" to refer to such proceedings pursuant to

the "otherwise provided" clause of subsection (a). The Board notes its interpretation is consistent with the I.C.C.'s reading of 49 U.S.C. § 11701 (as recodified in 1978). Because the term "formal investigative proceeding" had an established meaning before the ICCTA was enacted, the Board suggests Congress is presumed to have been aware of that interpretation when it retained the phrase in section 11701(c) in 1995. Any other reading, it maintains, would produce an absurd, unfair, and perhaps even unconstitutional result by depriving a complainant of a decision on the merits of its rate complaint where the delay was not the complainant's fault, perversely rewarding the railroad that managed to prolong a rate proceeding beyond the three-year limit. WFA's right to due process, the Board maintains, would be violated in two ways: lack of a fair opportunity to present its case after the Board changed the rule on revenue allocation for cross-over traffic and failure to receive a final agency decision on the merits.

The conflicting statutory interpretations reprise the arguments made by BNSF and the Board in *Xcel*, 453 F.3d at 479 (D.C.Cir.2006). This court observed then that:

> The Board's concern with due process may be well-founded. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (holding "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" and therefore could not constitutionally be extinguished by expiration of the 120-day period for state agency to convene a fact-finding conference). We need not resolve the issue of the three-year limit, however, because

> BNSF failed to raise the argument in a timely manner.

Id. So too here.

In *Xcel*, the court explained that "[a] reviewing court generally will not consider an argument that was not raised before the agency 'at the time appropriate under its practice.'" 453 F.3d at 479 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952)). In that case, BNSF raised the three-year limit argument after three and one half years of proceedings, when the Board had ruled against it on the merits and BNSF was petitioning for reconsideration. Without identifying "the exact moment the argument was forfeited," the court concluded "it could not have been later than when the Board decided the case because the criteria for granting reconsideration are limited by statute." *Id.* (citing 49 U.S.C. § 722(c) (requiring "material error, new evidence, or substantially changed circumstances")). The court further rejected BNSF's objection that the "automatic" dismissal provision in section 11701(c) was a "'mandatory directive' ... leav[ing] no discretion in the [Board] to treat its claim as having been forfeited," stating that "[e]ven a defect in the jurisdiction of an agency ... when not timely raised before that agency is forfeit ... unless it 'concerns the very composition or constitution of that agency,'... which BNSF's objection does not." *Id.* (internal citations omitted).

In the instant case, BNSF first argued before the Board that the three-year limit required the WFA proceeding be dismissed in July 2008, after three and three-quarters years of proceedings and nine months after, according to BNSF, the three years had run from

the filing of WFA's verified complaint. This also was ten months after the September 2007 Decision and five months after the Board denied BNSF's petition for reconsideration of the September 2007 Decision. BNSF mentioned the three-year limit in its petition for reconsideration but, as it conceded during oral argument, it did not argue the proceeding had to be dismissed, only that it was "unfair to BNSF to allow this proceeding to continue beyond the three-year cut off ... when the complainants, who have the burden of proof, failed to demonstrate in their original SAC evidence that they are entitled to any relief." BNSF October 2007 Pet. for Reconsideration at 2. In denying reconsideration the Board noted the parties had agreed to a procedural schedule (through July 2008) that would include time for additional discovery. February 2008 Denial of Reconsideration at 8. These are circumstances of forfeiture similar to those identified in *Xcel*, 453 F.3d at 479.

BNSF's explanation during oral argument for its delay in raising the three-year limit argument, that it viewed the September 2007 Decision as a final decision and the later proceeding as a reopening, does not negate the forfeiture. The September 2007 Decision indicated on its face it was not a final decision, affording WFA thirty days to decide whether it wanted to submit supplemental evidence on a new or revised SARR and stating that unless WFA decided to supplement its evidence the proceeding "*will* be discontinued." September 2007 Decision at 20 (emphasis added). Even though BNSF could have filed a motion to dismiss at any point in the WFA proceeding, *see* 49 C.F.R. § 1111.5, it stood silent before the Board after the denial of its petition for

reconsideration in February 2008 and while WFA prepared and presented a revised SARR to the Board in May 2008. BNSF also stood silent before the Board after the Board filed a motion on May 19, 2008 to dismiss the appeal of the September 2007 Decision as premature,[8] waiting two months after the Board's motion to argue the three-year limit before the Board, *see* BNSF July 14, 2008 Reply at 47-49, even though BNSF had argued before this court in response to the Board's motion to dismiss that the pending proceedings were otherwise improper because they extended beyond the three-year limit, citing *Xcel*'s holding on "waiver," 453 F.3d at 480. *See* June 3, 2008 BNSF Resp. to Board's Mot. to Dismiss at 14-15, *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, Docket No. 08-1167 (D.C.Cir. Jun. 3, 2009). Under the circumstances BNSF did not timely present the three-year limit argument to the Board. *See Xcel*, 453 F.3d at 479.

Although this court has held that a forfeiture can be forfeited by failing on appeal to argue an argument was forfeited, *see Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 344 (D.C.Cir.2004); *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C.Cir.1997), that precedent is inapplicable. The Board never acquiesced in BNSF's view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected BNSF's argument on the merits when it was first raised in July 2008.

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[8] This court dismissed the appeal. *See W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, Docket No. 08-1167 (D.C.Cir. Jun. 3, 2009).

III.

On the merits, BNSF contends the Board's Decision is arbitrary and capricious for allowing WFA to reroute traffic in its May 2008 evidentiary presentations and in modifying ATC. Our review is deferential, looking to see whether the decision is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" 5 U.S.C. § 706(2)(A), (E), "bearing in mind that '[w]here an agency has rationally set forth the grounds on which it acted, ... this court may not substitute its judgment for that of the agency.'" *Xcel*, 453 F.3d at 480 (internal citation omitted).

BNSF maintains that the Board did not hold WFA to its burden to justify its traffic selection and failed to explain why WFA's rerouting of traffic was consistent with SAC principles. BNSF objected in July 2008 to WFA's revised traffic selection that included high rated "Jeffrey traffic" on the ground that it was beyond what the Board had authorized in the September 2007 Decision. On appeal, BNSF suggests that the "Jeffrey traffic" "shares virtually no facilities with WFA's traffic," Pet'r's Br. 46, and that together with the dropped profitable but lower-rated traffic it did nothing to advance the objectives of the SAC test.

The Board determined that WFA's replacement of the lower-rated 19 million tons of traffic with higher-rated "Jeffrey traffic" was within the "broad flexibility" allowed by the *Guidelines* at 543-44. Explaining that "every choice made by a complainant in designing a SARR will be done with an eye to reducing the maximum lawful rate produced under the SAC test" and that the traffic choice is valid "[s]o long as the complaint does not violate any SAC rule or

principle in the process," February 2009 Decision at 7, the Board concluded the "Jeffrey traffic" met the criteria for inclusion by demonstrating that "the route is reasonable and would meet the shipper's transportation needs," *id.* at 11 (citing *Tex. Mun. Power Agency v. BNSF*, 6 STB 573, 589 (2003)).

The court will defer because the Board's determination invokes its expertise, *see Major Issues Appeal*, 526 F.3d at 774, and we find no fault with the Board's reasoning. The Board's approval of the rerouted traffic is consistent with the Board's precedent that the complainant designing the system from scratch has "broad flexibility to develop the least costly, most efficient plan" and to select the traffic group, including crossover traffic, for its SARR. *Guidelines* at 543-44; *see Duke Energy Corp. v. CSX Transp., Inc.*, 7 STB 402, 417 (June 2003-Dec.2004), 2004 WL 250254, at **10-11. BNSF presents no persuasive argument to question the Board's reasonable distinction between requiring a compelling justification for changing a traffic route only where the selected traffic shares no facilities in the real world, and requiring only that the complainant account for any off-SARR changes where the selected traffic shares at least some facilities in the real world, as does the "Jeffrey traffic." *See* February 2009 Decision at 11 n. 16; *see also Duke Energy*, 7 STB at 418, 2004 WL 250254, at *11; *Pub. Serv. Co. of Colo. d/b/a Xcel v. Burlington N. and Santa Fe Ry. Co.*, 7 STB 589, 607-08 (June 2003-Dec.2004), 2004 WL 1428724, at * 12.

BNSF also contends the Board's modification of ATC in the September 2007 Decision was arbitrary and capricious because modified ATC fails appropriately to consider economies of density and artificially inflates

the revenues attributable to the SARR. It suggests that in the *Major Issues Rulemaking* "[t]he Board recognized that it must consider the relative average total costs of each segment, rather than their average variable costs, in order to take adequate account of economies of density." Pet'r's Br. 50 (citing the *Major Issues Rulemaking* at 34-35 and the *NPRM* at 20). BNSF maintains that under the Board's two-step approach—by assigning revenues to cover the variable costs in step one without reflecting economies of density, and by then allocating any remaining revenues to cover the fixed costs plus the variable cost in step two taking economies of density into account—variable costs are counted twice. In BNSF's view, this "all but ignores the fundamental purpose of ATC (accounting for the economies of density)." Pet'r's Br. 51. The effect, BNSF claims, is that the high-density SARR segments tend to receive a disproportionately large share of revenues leaving the incumbent carrier with insufficient revenues to cover the proportionally higher cost of lower-density off-SARR lines.

The Board determined upon applying ATC, as adopted in the *Major Issues Rulemaking*, that it had not accounted for a situation in which low-rated cross-over traffic did not cover its own variable costs for portions of the rail movement. *See* September 2007 Decision at 14. The Board explained that "[b]ecause the traffic group includes considerable traffic with total revenue either below or barely above variable cost, and because the off-SARR segments of the movements have lower densities, the practical effect of the parties' approach would be to drive the R/VC percentages of the movements below 100%," meaning "the on-SARR revenue allocation for those movements would be

insufficient to cover the variable cost ... of handling traffic for the highest-density portion of a movement." *Id.* at 14. "To avoid such an illogical and unintended result," *id.*, the Board modified ATC. "Instead of applying ATC allocation procedure to total revenue, we will apply the same allocation procedure to total revenue *contribution*" so that "the revenue assigned to the on-SARR part of a cross-over movement will equal the variable cost to haul the traffic over the facilities replicated by the SARR plus the portion of available revenue contribution allocated in accordance with ATC." *Id.* (emphasis in original).

On appeal the Board acknowledges that it "did not specifically mention 'double-counting'" in denying BNSF's petition for reconsideration of the September 2007 Decision. Resp't Br. 63. Rather, the Board stated that modified ATC would not reintroduce bias because it is "even-handed." February 2008 Denial of Reconsideration at 4-5. The Board noted that BNSF had previously suggested adoption of a similar methodology, the Density Adjusted Revenue Allocation ("DARA"). *Id.* at 5. However, the Board had rejected DARA as being "insensitive to the actual economies of density associated with particular movements" and observed that ATC, as adopted in the *Major Issues Rulemaking*, "does not suffer from the deficiency that led to the Board's rejection of DARA." *Major Issues Rulemaking* at 26. WFA has offered a response in its brief at 35-36, explaining that BNSF's concern with double-counting is not problematic because step one recognizes that average variable costs do not vary with density, while step two recognizes that average total cost declines as density increases because the fixed costs are "spread over a larger

number of traffic units," WFA Br. at 36. However, the Board never relied on this rationale and so cannot do so on appeal. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

Accordingly, we grant the petitions in part, so that the Board on remand can address BNSF's double-counting objection to modified ATC, and we otherwise deny the petitions.

SERVICE DATE – SEPTEMBER 10, 2007

This decision will be printed in the bound volumes of the STB printed report at a later date.

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: September 7, 2007

The Board finds that the defendant railroad has market dominance over the transportation at issue, but that the complainant has failed to establish that the challenged rates are unreasonably high. Complainants are offered an opportunity to submit supplemental evidence under the stand-alone cost constraint.

* * *

BY THE BOARD:

OVERVIEW

This case involves a rate dispute between Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA), and BNSF Railway Company (BNSF) over the maximum lawful rate BNSF can charge to haul 8 million tons of coal each year from the Powder River Basin (PRB) in

Wyoming a short distance (200 miles) to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, WY. The Laramie River plant is served only by BNSF and there are no feasible transportation alternatives for transporting PRB coal to this facility. The reasonableness of the common carriage rates established by BNSF is therefore subject to our jurisdiction.

Prior to this dispute, rail transportation to the Laramie River plant was handled by a mutually agreeable contract entered into in 1984. This 20-year contract was the product of a settlement of an antitrust case brought by WFA against BNSF, which claimed the carrier had unlawfully exploited its monopoly position in the PRB. Under the terms of the contract, the transportation rate dropped in nominal terms from $4 per ton (in 1984) to $3 per ton (in 2004). During that same time period, railroad costs increased approximately 60% and demand for PRB coal production increased by 500%. When the contract expired in 2004, the parties were unable to negotiate another rail transportation contract. BNSF therefore established a common carrier rate, which was twice the expired contract rate, or roughly $6 per ton.

Because WFA's plant is located so close to the PRB, its rate to the Laramie River plant is one of the lowest transportation rates any utility pays to acquire PRB coal. Many utilities that desire the low-sulfur PRB coal are located in distant states such as Texas or Georgia, and pay two or three times this rate. Even in comparison to other utilities located near (but not quite as close to) the PRB mines, the rate is low on a dollar-per-ton basis. The rate is also low in comparison to

other PRB rates that have been challenged before the Board as unreasonable by other captive shippers.

Nonetheless, WFA considers the $6 rate unreasonable. As it points out, the challenged rate is twice the expired contract rate, and (because the plant is only 200 miles from the PRB) the rate per mile far exceeds the rate per mile paid by utilities located further away. Standing alone, however, these facts do not indicate that the new rate is unlawful or what the maximum reasonable rate would be. Accordingly, WFA sought to demonstrate that, under the Board's stand-alone cost (SAC) test, it is cross-subsidizing other BNSF traffic by paying more than is needed to provide a reasonable return on the rail facilities necessary to serve WFA. It contended that the maximum lawful rate under the SAC test should be $3.10 per ton (in 2005) and sought more than $20 million per year in rate relief until the year 2024.

The record does not support WFA's claims, however. The cost of the 200 miles of rail facilities needed to serve WFA and other traffic WFA selected to share those expenses would be $870 million. Yet the revenue generated from this traffic—including the $50 million WFA would pay annually under the challenged $6 rate—less operating and maintenance expenses would provide a return on this investment that is less than the cost of capital for the railroad industry. As such, it would appear that WFA is only being asked to pay for the 200 miles of rail facilities it uses, and is not being forced to cross-subsidize other parts of BNSF's broader rail network.

WFA asserts, however, that the reason its SAC presentation does not demonstrate that the rates are unreasonable is because the Board changed certain key

procedures after WFA submitted its SAC presentation. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) et al. (STB served Oct. 30, 2006) (Major Issues), pets. for judicial review pending sub nom. BNSF Ry. v. STB, No. 06-1372 et al. (D.C. Cir. filed Nov. 14, 2007). WFA argues strenuously, and persuasively, that had it known that the Board would change the revenue allocation methodology for cross-over traffic, it would have offered a different case. The change to the revenue allocation methodology clearly could have prejudiced WFA. Given these circumstances, we have contemplated two alternatives. We could apply the old procedures that WFA relied upon, but which have been discredited and replaced with superior procedures. Alternatively, we could use the new procedures, but permit WFA to submit supplemental SAC information if it believes a revised case could demonstrate that the challenged rate is unreasonable.

We believe fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology. Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions. In this case, however, the change would affect the basic design of a SAC case. For example, WFA included in its traffic group considerable traffic offering limited revenue contribution, as those movements are to competitively served plants. This may have been a reasonable design choice under the old revenue allocation method. But under the new approach, WFA might not have included all that traffic or might have changed the configuration of the stand-alone railroad (SARR).

This course strikes a reasonable balance by seeking to maintain reasonable rates where there is an absence of competition while promoting a safe and efficient rail system in which carriers are allowed to earn adequate revenues. See 49 U.S.C. 10101. We appreciate that redesigning its SAC presentation will require WFA to incur more litigation expenses. But we cannot, as WFA has urged, use now-discredited procedures to resolve a dispute involving millions of dollars and establish rate prescriptions that would extend for two decades. Moreover, the principal change WFA complains of is the adoption of a new revenue allocation procedure. But that change was foreshadowed by a recent federal court decision, which warned the Board that continued use of the old approach was "on shaky ground indeed." BNSF Ry. v. STB, 453 F.3d 473, 484 (D.C. Cir. 2006). As such, any attempt to apply the old revenue allocation approach might not benefit WFA in any event, as the use of the discredited method might not survive judicial review.

The decision below sets forth the evidentiary disputes, our resolution of those issues, and the basis for our conclusion that WFA has failed to demonstrate, on this record, that the challenged rates are unlawful under the SAC test. WFA will have 30 days to inform us whether it wishes to submit supplemental SAC evidence. If it chooses not to do so, we will discontinue this proceeding.

PROCEDURAL HISTORY

By complaint filed on October 19, 2004, WFA, challenges the reasonableness of rates charged by BNSF for unit-train movements of coal from origins in Campbell and Converse Counties, in the PRB of Wyoming, to Basin Electric's Laramie River Station

(LRS) near Moba Junction, WY. The rail transportation to LRS electric generating station was previously provided by BNSF under a transportation contract. When that contract was not renewed, BNSF established common carriage rates (in Common Carrier Pricing Authority 90077), effective on October 1, 2004. WFA seeks to demonstrate the unreasonableness of these rates under the agency's stand-alone cost (SAC) methodology.

The parties filed their opening presentations on March 19, 2005, their reply evidence on July 20, 2005, and their rebuttal evidence on October 3, 2005. BNSF filed a motion to strike portions of WFA's rebuttal evidence on October 20, 2005.

On February 27, 2006, the Board held this proceeding in abeyance so that it could consider various recurring methodological issues that had been raised or were implicated in the pending rate cases. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006). WFA and BNSF, along with other interested parties, filed opening comments on the proposed rules on May 1, 2006, reply comments on June 1, 2006, and rebuttal comments on June 30, 2006. We issued final rules on October 30, 2006, adopting all of the proposed changes to our ratemaking procedures.

Meanwhile, by decision served on March 17, 2006 (First Compliance Order), the Board directed both parties to file additional evidence in this proceeding to address some gaps in the evidentiary record. In response, WFA submitted supplemental opening evidence on May 15, 2006, BNSF submitted supplemental reply evidence on June 15, 2006, and

WFA submitted supplemental rebuttal evidence on July 14, 2006.

After we completed the rulemaking,[1] we issued a further decision in this proceeding on November 8, 2006 (Second Compliance Order), directing the parties to file additional evidence to reflect the methodological changes adopted in Major Issues. Accordingly, WFA filed second supplemental opening evidence on February 22, 2007, BNSF filed second supplemental reply evidence on March 26, 2007, and WFA filed its second supplemental rebuttal evidence on April 9, 2007.

* * *

F. Implementation of New Procedures

WFA objects to the application of the new procedures adopted in Major Issues to this case. It argues that, had it known the Board would apply the different revenue allocation method, it would have designed a different SARR. WFA therefore has asked that we apply the old procedures, particularly the MSP method for allocating revenues from cross-over traffic. Presumably, WFA would have us apply all the old procedures—even those which favor the carrier such as the percent reduction method or forecasting operating expenses without any adjustment for productivity—and not just those that favor WFA.

We do not believe it is appropriate to apply flawed or discredited procedures, rather than the superior procedures adopted in Major Issues. With regard to the revenue allocation methodology, which is the focus

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[1] Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) et al. (STB served Oct. 30, 2006) (Major Issues), pets. for judicial review pending sub nom. BNSF Ry. v. STB, No. 06-1372 et al. (D.C. Cir. Filed Nov. 14, 2007).

of WFA's objections, a federal court has explicitly warned that, if the Board were "presented with a model that took account both of the economies of density and of the diminishing returns thereto, a decision to adhere to its MSP model would be on shaky ground indeed."[27] Moreover, while complainants may have relied on MSP in designing the SARR, they should have been aware that the Board had no established methodology (e.g., PPL at 7. n.14 and Duke/NS at 17 n.27), that the MSP approach has long been under attack, (e.g., Xcel at 17-19 and Otter Tail at 13-17) and that the Board has stated its preference for an approach that can take economies of density into account (see Duke/NS at 22).

Nonetheless, we believe fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology. Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions. In this case, however, the change from MSP to ATC would affect the basic design of a SAC case. For example, WFA included in its traffic group considerable traffic offering limited revenue contribution, as those movements are to competitively served plants. This may have been a reasonable design choice under MSP, which over-allocated revenue to the SARR. But under ATC, WFA might not have included all that traffic or might have changed the configuration of the LRR.

Accordingly, WFA should inform the Board, within 30 days of the service date of this decision, if it wishes to supplement or revise its SAC presentation. WFA

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[27] BNSF Ry. v. STB, 453 F.3d 473, 484 (D.C. Cir. 2006).

may increase or decrease the traffic group, change the configuration of the LRR, and submit evidence on all related issues (such as the revenue from new traffic or construction costs avoided or added due to a new configuration). However, neither party will be allowed to use this reopening of the record to relitigate unrelated issues (such as how to account for non-SARR traffic at the PRB mines).[28] If WFA elects to pursue this option, it should suggest an appropriate procedural schedule. If WFA does not seek to present new SAC evidence, we will discontinue this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's motion to strike and request to submit limited sur-rebuttal is denied.

2. The unreasonable practice allegations are dismissed.

3. WFA shall advise the Board within 30 days of the service of this decision whether they wish to submit supplemental SAC evidence.

4. This decision is effective on October 10, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

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[28] Parties should use the 20-day reconsideration period to identify technical or substantive errors in this decision based on the record developed to date. This 20-day deadline is not stayed pending possible supplemental evidence from WFA.

SERVICE DATE – LATE RELEASE FEBRUARY 18, 2009

This decision will be printed in the bound volumes of the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: February 17, 2009

The Board finds that the defendant railroad has market dominance over the transportation at issue and that the challenged rates are unreasonably high. Maximum reasonable rates are prescribed and reparations are ordered.

* * *

BY THE BOARD:

OVERVIEW

This case involves a rate dispute between Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA), and BNSF Railway Company (BNSF). The dispute is over the reasonableness of the rates BNSF charges to WFA for hauling 8 million tons of coal each year from mines in the Powder River Basin (PRB) in Wyoming to WFA's

Laramie River Station plant (LRS) at Moba Junction, WY. Because the rate is a common carriage rate and the LRS plant is captive to BNSF, the reasonableness of the rate is subject to our jurisdiction.

In its first attempt, WFA failed to show the challenged rates to be unreasonable under our stand-alone cost (SAC) test. But WFA had designed its SAC presentation under one set of rules, only to have those rules changed during the course of the proceeding. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (Major Issues). We recognized that the change in revenue allocation procedure could have affected the optimal size and configuration of the stand-alone railroad (SARR) designed by WFA. Therefore, in our decision in the proceeding served on September 10, 2007 (Sept. 2007 Decision), we afforded WFA the opportunity to redesign the SARR to address the new revenue allocation procedure and to submit supplemental evidence based on that redesign.

In this second attempt, WFA has succeeded in making its case. Although the challenged rates are among the lowest transportation rates any utility pays to receive PRB coal, WFA has shown that its rates far exceed the level BNSF needs to charge to earn a reasonable return on the full replacement cost of the facilities used to serve WFA, because the Laramie River Station plant is located so close to the PRB. As such, it is now clear that BNSF has been forcing WFA to cross-subsidize other parts of BNSF's broader rail network that WFA does not use. This is prohibited. So although the challenged rates appeared on their face to be commercially reasonable, they exceed by a wide

margin the level BNSF is permitted to charge under the SAC test.

Accordingly, we will order BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004, and we will prescribe the maximum lawful rate that BNSF can charge until 2024. The maximum lawful rate is expressed as a revenue-to-variable cost ratio. Although it varies from year-to-year, the maximum lawful rate BNSF may charge in 2009 is roughly 240% of its variable costs, which translates to a roughly 60% reduction in the transportation rate.

This amounts to the single largest reduction in rail rates ever ordered by this agency. Although the record does not provide the data needed to calculate precisely the total amount of reparations due to WFA, we estimate that reparations are roughly $28 million per year. We further estimate that the total relief WFA will obtain as a result of this order—including both reparations and the lower prescribed rate through 2024—will approximate $345 million (in current dollars).

Following our standard practice, the parties are to calculate the total amount of reparations and interest due, in accordance with this decision. If they cannot agree, the parties should bring the dispute to our attention for prompt resolution.

* * *

D. Scope of Recoverable Relief

BNSF makes three arguments for why the Board should award no damages for movements before the date of the Sept. 2007 Decision. First, it claims that Arizona Grocery Co. v. Atchison, Topeka & Santa Fe

Railway Co., 284 U.S. 379 (1932) (Arizona Grocery), precludes the Board from awarding retroactive relief before this phase of the proceeding. BNSF asserts that the Arizona Grocery principle applies here because the Board conclusively resolved WFA's rate complaint when we found the challenged rate reasonable in the Sept. 2007 Decision and that the rate then became the lawful rate. Thus, the shipments that moved under the rate addressed in the Sept. 2007 Decision cannot be subject to retroactive change, it argues. Alternatively, if the Board considers the Sept. 2007 Decision as a preliminary decision in this proceeding, rather than a final decision under Arizona Grocery, BNSF argues that the Board violated the requirement of 49 U.S.C. 11701(c) that the proceeding be completed within 3 years. Finally, BNSF asserts that fairness dictates that this decision be given only prospective relief.

We will deny BNSF's request to limit the damages available to WFA. First, Arizona Grocery is not applicable, as we did not conclusively resolve WFA's rate complaint in the Sept. 2007 Decision. Rather, we concluded that, based on WFA's submission, the rates did not *appear* to be unreasonably high. But we also recognized that, by our having changed the substantive standards, WFA had not had a fair chance to make its case. It had designed its case under one standard, only to have it judged under another. Following well-established legal precedent, we therefore provided WFA an opportunity to redesign pertinent aspects of its case and submit revised evidence under the new legal standards. Accord Hatch v. FERC, 654 F.2d 825, 835 (D.C. Cir. 1981). Thus, there was nothing final about the Sept. 2007 Decision.

Second, the 3-year timetable in 49 U.S.C. 11701(c) does not apply to rate cases begun on complaint. See AEP Texas North v. BNSF Ry., STB Docket No. 41191 (Sub-No. 1) (STB served Nov. 13, 2006); Complaints Filed Pursuant to the Savings Provision of the Staggers Rail Act of 1980, 367 I.C.C. 406 (1983). The timetable applies only in those circumstances where the Board institutes a proceeding on its own initiative.

Third, fairness dictates that WFA receive the full relief afforded it under the statute. WFA has shown the challenged rate to be unreasonable under the standards adopted in Major Issues. Accordingly, WFA has a statutory right to reparations. 49 U.S.C. 11704. Under the SAC test, BNSF can charge a rate that provides a reasonable return on the full replacement cost of the rail assets needed to serve WFA, but no more.

* * *

It is ordered:

1. BNSF's motion to strike is denied.

2. BNSF's motion to dismiss is denied.

3. BNSF is ordered to pay reparations to WFA in accordance with this decision and to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed in this decision.

4. This decision is effective on March 20, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

SERVICE DATE – JUNE 5, 2009

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: June 3, 2009

In this proceeding, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) challenged the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) in Wyoming to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, WY. In a decision served on February 18, 2009 (February '09 Decision), we found that WFA had shown that BNSF has market dominance over those movements, and that its rates exceeded the level BNSF needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve WFA. Accordingly, we ordered BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004.

On March 10, 2009, WFA and BNSF filed a joint petition to correct technical and computational errors. As discussed below, we agree that errors were made in certain density and variable cost calculations in the

February '09 Decision which affect the application of the Board's discounted cash flow (DCF) model. We correct those errors as discussed herein.

DISCUSSION AND CONCLUSIONS

The February '09 Decision contained certain density and variable cost calculations in applying the average total cost (ATC) procedure for calculating revenue divisions for cross-over traffic. WFA posited that some traffic would traverse its stand-alone railroad (SARR) via a different routing than that by which that traffic actually moves over BNSF's system. In reliance on BNSF's evidence, the Board mistakenly calculated the revenues allocated to the SARR based on the costs and densities associated with the new SARR re-routings of those movements, not, as the Board intended, over the actual, historical routing. See February '09 Decision at 13-15.

In particular, the parties identified revenue divisions for six movements that were incorrectly calculated in the February '09 Decision: (1) PSCO/Xcel move from Eagle Butte Mine to Pawnee, CO; (2) Reliant Energy move from Buckskin Mine to Smither's Lake, TX; (3) TXU Energy move from Eagle Butte Mine to Big Brown, TX; (4) West Texas Utilities move from Buckskin Mine to Oklaunion, TX; (5) West Texas Utilities move from Rawhide Mine to Oklaunion, TX; (6) West Texas Utilities move from Caballo Rojo Mine to Oklaunion, TX.

We agree with the parties that the revenue divisions for these six movements were incorrectly calculated and now fix the error to reflect the actual routing, as described in the February '09 Decision. The revised data has been re-incorporated into the DCF analysis. As shown in the revised tables below, the

result of these changes yields slightly higher maximum revenue to variable cost (R/VC) ratios.

[Tables 1-3 omitted.]

The parties have also filed a number of pleadings regarding whether the rates recently established by BNSF comply with the February '09 Decision. That dispute centers on compliance with the February '09 Decision, rather than whether the February '09 Decision is correct. Questions about compliance will be resolved in a newly created sub-docket in this proceeding. See Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company – Compliance, STB Docket No. 42088 (Sub-No. 1). Today's decision thus concludes with finality the administrative proceeding establishing the maximum lawful revenue-to-variable cost levels for the traffic at issue.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WFA's and BNSF's joint petition to correct technical and computational errors is granted.

2. The rate prescription and reparations award in this case are revised as discussed above. The parties are ordered to re-calculate the amount of reparations, and BNSF shall establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed by the February '09 Decision, as corrected here.

3. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

SERVICE DATE – LATE RELEASE JULY 27, 2009

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088 (Sub-No. 1)

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: July 23, 2009

The Board finds that the defendant railroad has not established transportation rates in accordance with the rate prescription in STB Docket No. 42088. The Board therefore orders the railroad to establish maximum lawful rates in accordance with the methodology described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

BY THE BOARD:

OVERVIEW

In the lead docket, No. 42088, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) challenged the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) in Wyoming to WFA's Laramie River Station (LRS) coal-fired electric utility plant at Moba Junction, WY. In a decision served on February

18, 2009 (February '09 Decision), we found that BNSF has market dominance over those movements and that the challenged rates were unreasonably high. Accordingly, we ordered BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004. In a further decision, served on June 5, 2009 (June '09 Decision), we modified the rate prescriptions to correct an error in certain density and variable cost calculations.

We must now resolve a dispute between WFA and BNSF over whether the rates BNSF established on March 20, 2009, exceed the maximum lawful levels prescribed in the February '09 Decision, as modified in the June '09 Decision. We find that BNSF has used the proper method in general for calculating the maximum lawful rates in 2009, but erred in its indexing approach. The rates it established therefore exceed the permissible maximum revenue-to-variable cost (R/VC) ratio for 2009.

Accordingly, BNSF is ordered to establish transportation rates that comport with our June '09 Decision. We have calculated, for the first two quarters of 2009, the maximum lawful rates from each of the 12 PRB mines embraced in the rate prescription. BNSF should in turn establish the proper rates for the third quarter of 2009, and adjust those rates quarterly in the manner described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

Once BNSF establishes updated rates, WFA should calculate the precise amount of reparations due and submit its statement of damages to BNSF, in accordance with 49 CFR 1133.2. BNSF itself has estimated that it now owes WFA roughly $112 million

in reparations, but this calculation is too conservative given our finding that BNSF has established rates in excess of those permitted by our February '09 Decision and June '09 Decision. If the parties cannot resolve the precise amount of reparations due, WFA may bring the dispute to our attention.

BACKGROUND

1. Prior Decision Finding Challenge Rates Unreasonable

This case involves a large rate dispute between WFA and BNSF over the reasonableness of the rates charged to haul 8 million tons of coal each year from mines in the PRB in Wyoming to the LRS generating plant. Because these are common carriage rates and BNSF possesses market dominance over WFA's shipments to the LRS plant, we have both jurisdiction over the rates and authority to review their reasonableness when challenged.

In the February '09 Decision, we found that the challenged rates were unreasonably high and ordered BNSF to lower its rates and reimburse WFA for any overpayments, including interest. We did not, however, prescribe specific rates for transportation from the 12 PRB origin mines at issue. Instead, we ordered BNSF to maintain rates that did not exceed a prescribed R/VC ratio. After minor corrections in the June '09 Decision, we prescribed the maximum lawful R/VC ratios that BNSF is permitted to charge WFA for transportation from these 12 PRB mines to the LRS plant (between 2004 and 2024) as follows:

[Table 1 omitted.]

2. Maximum Markup Methodology

The approach followed in this case to establish the maximum lawful R/VC ratios reflected the application of significant innovation in our rate procedures for handling large rail rate disputes. In Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (Major Issues), we adopted an entirely new approach to calculate maximum lawful rates in such cases, called the "Maximum Markup Methodology" (MMM). Under MMM, we calculate a maximum R/VC ratio that limits the amount of demand-based differential pricing the defendant carrier can engage in for a given year. Under this new approach, we no longer prescribe fixed transportation rates for as many as 20 years, as was our practice in prior large rate cases, but instead we prescribe an R/VC ratio that permits the transportation rate to change from year to year (or from quarter to quarter) to reflect changes in the rail operating costs, such as fuel costs.

Accordingly, in this case we ordered BNSF to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable R/VC ratios in **Table 1**. The variable cost of the issue movements was to be calculated for this purpose using the Uniform Railroad Costing System (URCS), with no adjustments, and with indexing as appropriate.[1] If there was a dispute over how to calculate variable costs, WFA was directed to bring that dispute to our attention.[2]

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[1] February '09 Decision at 31

[2] Id.

3. Present Dispute Over Compliance

On March 20, 2009, BNSF established rates for 2009 to comply with our February '09 Decision, which stated that the railroad could not charge rates that exceeded 240% of the variable costs of providing the transportation. (In our June '09 Decision the prescribed R/VC ratio was adjusted slightly to 241%.) BNSF therefore had to calculate the variable costs to transport coal from the 12 origin mines to the LRS plant at Moba Junction, WY. It used the most recent URCS data available (2007) and then followed well-established precedent to index those 2007 costs to the first quarter of 2009 with a combination of the Association of American Railroad (AAR) index and the Producer Price Index (PPI). BNSF notified the Board of its purported compliance with the February '09 Decision.

On April 2, 2009, WFA filed a reply to BNSF's notice, asserting that these rates did not comply with our order. WFA claimed that BNSF had failed to calculate the 2009 variable costs in accordance with our prior decision. Rather than use the actual variable costs (as reflected in the most recent URCS data), WFA maintained that BNSF was supposed to utilize the variable cost estimates used by the Board when it calculated the maximum markup levels. In this case, that would mean using 2004 URCS and a 2006 forecast of changes in rail cost (specifically the Board's Rail Cost Adjustment Factor adjusted for productivity, or RCAF-A). Because the 2007 actual variable costs were higher than the 2006 RCAF-A forecasts used in our prior decision, the practical effect of using the method advocated by WFA would be to yield significantly

lower transportation rates. Table 2 depicts the rates established by BNSF and those sought by WFA.

[Table 2 omitted.]

BNSF responded on April 15, 2009. It maintains that its rates comply with our order, and observes that WFA now seeks maximum lawful rates in 2009 that result in R/VC ratios dramatically lower than the 240% level prescribed in the February '09 Decision.

On April 21, 2009, WFA filed a motion to strike BNSF's entire pleading, claiming it was an improper "reply to reply." In the alternative, it sought permission to file a surreply that accompanied the motion to strike. BNSF filed in opposition to the motion to strike, stating that it must have a right to respond to the accusation raised by WFA for the first time in its pleading styled as a "reply." BNSF also objected to the surreply as duplicative of the earlier arguments.[3]

On May 28, 2009, WFA filed a letter with the Board and with numerous members of Congress complaining that BNSF is trying to deprive WFA of approximately one-third of the relief we forecasted in the February '09 Decision.

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[3] We will deny WFA's motion to strike, but grant its request to file the surreply. WFA has the obligation to bring the dispute over variable costs to our attention, see February '09 Decision at 31, so we cannot preclude BNSF from replying even though WFA labeled its pleading as a "reply." And while WFA's surreply is itself a reply-to-reply, we will permit the pleading as BNSF has not argued it is prejudiced by consideration of the legal or technical arguments raised therein.

DISCUSSION AND CONCLUSIONS

It is settled that in 2009 BNSF may charge WFA no more than 241% of the variable costs to transport coal from the 12 PRB mines to the LRM plant. But the parties cannot agree on how to calculate the variable costs for any particular movement in 2009. There is therefore a vast discrepancy between the prescribed rates advocated by each party.

WFA argues that the same approach used to calculate the variable costs for purposes of computing the maximum markups in the February '09 Decision should be used to calculate the rate prescription. Because the maximum markups were derived using 2004 URCS figures and the 2006 forecast of RCAF-A, WFA urges us to calculate the 2009 variable costs by using 2004 URCS figures and then indexing those 2004 variable costs to present dollars by using a 2006 forecast of RCAF-A. WFA would use this same approach for every subsequent year as well. So in 2024, the prescribed rates would still be derived by using URCS data from 2004 (a full two decades earlier) and a 2006 forecast of RCAF-A.

BNSF argues that the point of prescribing R/VC ratios (rather than specific rates) was to permit the maximum lawful rates to adjust automatically with changes in actual operating costs, whereas the approach advocated by WFA would fail to do so.

Table 3 shows the actual variable costs in the first quarter of 2009, the rates BNSF and WFA would have us prescribe, and the resulting R/VC ratios. As shown, neither party is proposing rates that comport with our prior decisions setting the maximum lawful R/VC ratio at 241% of variable cost.

[Table 3 omitted.]

WFA raises three core arguments for its position. First, WFA maintains that "the Board held in Major Issues that parties should use the same set of indexed base-year costs to calculate the maximum MMM R/VC ratios *and* the resulting prescribed maximum MMM rates."[4] WFA is incorrect. While we did adopt a method for indexing base year costs to calculate the maximum R/VC ratios, we then stated that the rate prescription "would be expressed as an R/VC ratio."[5] We further stated that, to calculate the prescribed R/VC ratio in each year of the SAC analysis period (here, 20 years), "the parties should project the initial (base-year) URCS variable costs forward, using the hybrid approach ... for projecting the SARR's operating expenses."[6] But we did not state, nor was it our intent, that the resulting maximum lawful rates be fixed in place using the same variable cost estimates needed to implement MMM.

By expressing the rate prescription as an R/VC ratio, our MMM methodology allows the rates per ton charged for the issue traffic to adjust over time as actual costs change. This was an innovation introduced in Major Issues to address, in part, the concern that rate prescriptions that will remain in effect for years must be made based on a time-bound record and forecasts of future events. Expressing the rate prescription as R/VC ratios rather than as predetermined rates provides a flexible rate

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[4] WFA Reply at 14 (emphasis added).

[5] Major Issues at 14.

[6] Id. at 14 n.19. In this case, we modified the forecasting approach used to calculate the maximum R/VC ratios, replacing the hybrid approach described in Major Issues with a forecast of RCAF-A.

prescription methodology that allows the actual rates charged for the issue traffic to yield the same contribution prescribed by the Board as costs change. Such flexibility is particularly important in this case where the rate prescription is to last for 20 years. Indeed, had we intended for the MMM approach to translate into fixed rates, without regard to actual variable costs, we could simply have specified the maximum rates per ton BNSF could charge, rather than describing the maximum lawful rates in terms of R/VC ratios.

WFA's second argument is that use of the actual variable costs will violate a fundamental SAC principle that traffic group revenues be reduced to equal the SAC requirements of the hypothetical SARR.[7] To illustrate, WFA uses an example of an issue movement from the Dry Fork mine. In calculating the maximum R/VC ratio for the first quarter of 2009, the MMM analysis forecast the maximum rate for the Dry Fork mine at $4.06 per ton. Substituting actual variable costs for the forecasts in the record at the time would raise the maximum rate level to $5.16 per ton. WFA maintains that this would result in a windfall for BNSF, as BNSF would be able to collect more than the SAC costs from the traffic group, and thus violate core SAC principles.

We reject WFA's premise that using actual variable costs (rather than forecasts from the record) to set the maximum lawful rate is improper or will provide a windfall to BNSF. Forecasts play a significant role in SAC cases. Our analysis relies heavily on forecasts of revenues, traffic flows, operating expenses, cost

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[7] See WFA Reply at 16.

indices, and cost-of-capital figures. In this case, those forecasts extended for 20 years, until the year 2024. To instruct BNSF on the maximum lawful rate it may charge until the year 2024, we must use those multiple, long-term forecasts to issue rate prescriptions. Rather than cast rates in stone, however, we decided in Major Issues to provide for more flexibility in our approach to rate prescriptions. Thus, we express rate limits as R/VC ratios, so that if operating expenses increase or decrease unexpectedly, as is the case here, the maximum lawful rates will respond automatically and immediately.

There is no basis on which to conclude that this approach will provide BNSF an expected windfall. In this case, operating expenses for 2009 are much higher than previously forecasted. Short of reopening the entire case and updating *all* the forecasts used therein, it is impossible to determine *a priori* what amount BNSF would be permitted to charge if a new SAC analysis were undertaken.[8] But we cannot be

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[8] WFA recalculated the MMM R/VC calculation for 2009 using actual variable costs (rather than the forecasts in our February '09 Decision) for all members of the traffic group. See WFA Surreply at 16-17. However, this calculation does not properly depict how the maximum R/VC ratios prescribed in our decision would change as a result of the higher than anticipated operating costs. To calculate the maximum lawful R/VC level for 2009, a critical input for the MMM approach is the 2009 SAC cost. This figure was $224 million as calculated in our February '09 Decision (Table 3 at 29). This $224 million figure reflects the total revenues that the hypothetical railroad would need to earn to recover its *forecasted* operating costs and earn a reasonable return on investment. The sharp increase in *actual* operating costs since the close of the record would increase the SAC costs above those forecasted in our decision. WFA, however, is only selectively updating our February '09 Decision and has kept constant the

constantly unraveling and reweaving our earlier work whenever actual events prove different from those previously forecasted. Thus, there is a need for flexibility in rate prescriptions so that they can be self-adjusting as operating expenses change, while continuing to provide a reasonable constraint on the pricing of the railroad.

We believe that the approach of setting the maximum R/VC ratios based on the best forecast of record—but then letting the actual maximum lawful rates adjust with changes in actual operating expenses—provides the appropriate balance of competing concerns. Consider for example what will happen in the year 2024. Under the approach adopted in Major Issues, the maximum lawful rate will be prescribed at 258% of variable costs, based on the record and forecasts in our original decision. If circumstances change, either party can seek to reopen that decision to have the maximum R/VC ratio changed. But the actual maximum lawful rate will depend on actual 2024 variable costs, not on URCS data from two decades earlier and a nearly two-decade old forecast of RCAF-A.[9]

2009 forecasted operating costs of the hypothetical railroad. (Nor has WFA updated the slew of other forecasts used to derive the 2009 SAC costs.) We conclude that the selective updating by WFA to recalculate new maximum R/VC ratios is inappropriate. We therefore disagree with WFA that, if we use actual variable costs to calculate the maximum lawful rates, all traffic group variable costs should be recalculated and the MMM model rerun. See WFA Surreply at 17.

[9] We also note that, under WFA's approach, the prescribed R/VC ratios in our decision would be pure fiction. They would not reflect the *actual* R/VC ratios the carrier may charge. The actual R/VC ratios the carrier could charge would be a secret shared

WFA's third argument is that using actual variable costs will deprive WFA of over 1/3 the value of the relief forecast by the Board. But any estimate of the total relief based on a 20-year prescription is necessarily speculative. This is a massive rate dispute with huge volumes of traffic over the 20-year period. Thus, even minor changes to the transportation costs will correspond to a change in the maximum lawful rate and cost one side or the other millions of dollars. In the February '09 Decision, we sought to provide the general public with an understanding of the magnitude of the dispute and the predicted relief. Our initial forecast of relief ($345 million over 20 years) was premised on forecasts of rail costs using the best information in the record at that time. Whether or not our initial forecast of the relief proves to be understated or overstated will only be known when the 20-year period nears completion. That initial forecast now appears overstated in light of actual market developments since the record closed. The drop is not attributable to any wrongdoing or improper conduct by BNSF, but to rising transportation costs. And as the carrier's operating costs have risen more than expected, so too must the prescribed rates rise or BNSF would not earn a reasonable return on the facilities used to serve WFA.[10]

Should actual future transportation costs fall below those forecast in our decision, WFA may receive more relief than we originally forecast. But in either event,

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only by the defendant carrier, the complainant, and their consultants and lawyers. This result is contrary to the need for transparency in our rate regulations to foster private negotiation and settlements.

[10] See BNSF Reply at 14.

the proper approach is to let the actual operating costs dictate the maximum lawful rates BNSF may charge WFA and thus the total amount of rate relief WFA ultimately receives. In short, WFA has not established a basis to depart from the approach adopted in Major Issues.

While we find BNSF's basic approach to calculating variable costs correct, the railroad has made some significant technical errors in its variable cost calculations. WFA correctly observed that BNSF has not applied the proper indexing approach to develop the variable costs for the first quarter of 2009. We have corrected that error, following our established indexing practice. We also use, as the best evidence of record, respectively, the total mileage submitted by BNSF (which properly includes loop miles) and its tons per car, but we rely on the number of cars submitted by WFA. Our variable cost calculations and the resulting maximum lawful rates are shown in **Table 4**.

[Table 4 omitted.]

We will make our workpapers available to BNSF and WFA upon request. BNSF is instructed to establish rates on a quarterly basis for the remainder of the rate prescription period, following the approach described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WFA's motion to strike is denied and its motion to file surrebuttal is granted.

2. BNSF is instructed to reestablish, within 30 days, transportation rates that comport with this decision, and then update those rate prescriptions quarterly as new variable cost information and indices become available, following the methodology described in Oklahoma Gas & Elec. v. Union Pacific R.R.

3. This decision is effective on August 26, 2009.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1092 *et al.* September Term 2009

Filed On: February 12, 2010

BNSF RAILWAY CO.,
Petitioner,
v.
SURFACE TRANSPORTATION BOARD,
Respondent.

Before: HENDERSON, ROGERS, and GARLAND, *Circuit Judges*.

ORDER

It is ORDERED on the court's own motion that the parties be prepared to address at oral argument on February 18, 2010 the following issues: (1) whether appellant BNSF Railway Company forfeited its objection to the Surface Transportation Board's failure to treat the shippers' complaints as automatically dismissed pursuant to 49 U.S.C. 11701(c) as of October 19, 2007 by waiting until July 14, 2008 to raise the objection, *see BNSF Ry. Co. v. STB*, 453 F.3d 473 (D.C. Cir. 2006); and (2) whether the Surface Transportation Board forfeited its right to rely on such forfeiture (if any) by failing to argue the issue on appeal, *cf. Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 344 (D.C. Cir. 2004) (citing *United States v. Layeni*, 90 F.3d 514, 522 (D.C. Cir. 1996)).

For the Court:
Mark J. Langer, Clerk

BY: Cheri W. Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1092 September Term 2010

STB-42088

Filed On: September 2, 2010

BNSF Railway Company,
Petitioner

v.

Surface Transportation Board and United States of America,
Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc.,
Intervenors

Consolidated with 09-1190, 09-1234

BEFORE: Henderson, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on June 25, 2010, and the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1092 September Term 2010

STB-42088

Filed On: September 2, 2010

BNSF Railway Company,
Petitioner

v.

Surface Transportation Board and United States of America,
Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc.,
Intervenors

Consolidated with 09-1190, 09-1234

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

49 U.S.C. § 11701

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART A. RAIL
CHAPTER 117. ENFORCEMENT: INVESTIGATION, RIGHTS, AND REMEDIES

§ 11701. General authority

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

(b) A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation. The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

49 C.F.R. § 1111.5

TITLE 49—TRANSPORTATION
SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION
CHAPTER X— SURFACE TRANSPORTATION BOARD, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B—RULES OF PRACTICE
PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

§ 1111.5 Motions to dismiss or to make more definite.

An answer to a complaint or cross complaint may be accompanied by a motion to dismiss the complaint or cross complaint or a motion to make the complaint or cross complaint more definite. A motion to dismiss can be filed at anytime during a proceeding. A complainant or cross complainant may, within 10 days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BNSF Railway Company, Petitioner, v. Surface Transportation Board, et al., Respondents.	No. 09-1092, et al.

Thursday, February 18, 2010

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

* * *

[9] JUDGE HENDERSON: And what authority is there for the re-opening authority extending the three-year deadline?

MR. BRESS: Well, in our view, Your Honor, a re-opening wouldn't extend the three-year deadline. In our view the case would be automatically dismissed as of October 19th, 2007 --

JUDGE HENDERSON: Right.

MR. BRESS: -- but they could re-open it with prospective effect. They addressed the ability to re-open matters with prospective --

JUDGE HENDERSON: I see what you mean.

MR. BRESS: -- effect --

JUDGE HENDERSON: I see. Okay.

MR. BRESS: -- in major issues itself. Now, even if we had been untimely, the Board's consideration of the issue on the merits, and their failure to raise untimeliness under the vast weight of judicial precedent, including in this Court, would say that the Board at that point would have forfeited any such claim. This Court hasn't addressed it in a wholesale way, but in Bowden v. United States, which is 106 F.3d 433, this Court so held in a case before it. I think the best discussion of this issue is actually in a Seventh Circuit case called Esther v. Principi, and that's 250 F.3d 1068, and that court head on looks at the question of do you treat a failure of an agency to raise something before it the same way [10] as you treat the failure of a party to 1 raise something in district court? In other words, you treat it as having been waived. And the court said yes, and it said because of a number of reasons, one is judicial economy, you want issues to have been flushed out before they get to this court; one is a lack of surprise to the parties when something is raised later; and one really relies on Chenery in the sense that you can't affirm the Board on a basis that the Board itself did not articulate, at least when it's not jurisdictional, and as this Court --

JUDGE ROGERS: So, your position is that the Board should have said not only does the three-year limit not apply, but even if it does you've waived the issue?

MR. BRESS: That's right. They should have said this has come to us untimely and we won't consider it.

JUDGE ROGERS: I mean, the difficulty about this whole waiver point it seems to me in part is the fact

that for more than 25 years the three-year limit hasn't been applied, whether that was lawful or not it just hasn't. But the Board at the ICC have made it clear what its interpretation was with regard to a complaint-based proceeding. So, you raise it initially by just saying it's not fair to go further than three years, then you raise it again later saying this case should be dismissed, and then alternatively you say look it, this is a re-opening going forward from 2007.

[11] MR. BRESS: That's right, Your Honor. But if they thought it was untimely they owed it to us to say so. I mean, we have to have the ability to understand --

JUDGE ROGERS: Well, they owed it --

MR. BRESS: -- what the rationale of the --

JUDGE ROGERS: Yes. But --

MR. BRESS: -- Board is in order to defend ourselves, because it may or may not be right if they say that it's untimely.

JUDGE ROGERS: But, I mean, the issue is preserved in the sense you raised it, and they said the three-year limit doesn't apply at all.

MR. BRESS: Well, the issue is preserved that they disagree with us on whether it applies.

JUDGE ROGERS: Yes.

MR. BRESS: But for them to fail to raise a timeliness argument really would be a bushwhack, and indeed, this Court in --

JUDGE ROGERS: How would that be a bushwhack?

MR. BRESS: Because --

JUDGE ROGERS: You, as Judge Henderson's been reviewing with you, you filed in July of '08 saying move to dismiss.

MR. BRESS: Because before this Court, Your Honor, we've had no ability to understand what argument they might [12] have with regard, this is moving to their failure now, to raise it before this Court. But if they raised it before they raised it in this Court we would be able to defend ourselves not only as we have over the past few days scouring the record to figure out what questions someone might come up with with regard to our filing, but we'd actually know what their opinion is, and their view is, and we'd be able to address it. And indeed, this Court in Southeast Alabama Medical, which two of Your Honors were on last fall, held that an agency's failure to raise a timeliness objection, so it's the same sort of thing, at the, I mean, before this Court waived or forfeit its ability to try to win on it. And it's interesting, what this Court said is it said that of course, a petitioner before an agency must raise an issue at an appropriate time, but the agency also must raise an issue before us, before this Court at an appropriate time, and the failure to do that meant that the issue was forfeit.

JUDGE ROGERS: Of course, the Court sua sponte is raising this, the agency wants to win on the merits saying that the three-year limit doesn't apply at all.

MR. BRESS: Well, Your Honor, that's true, the court did raise it sua sponte, but I'm not sure that that's a --

JUDGE ROGERS: I know. Yes.

MR. BRESS: -- distinction with a difference. I --

JUDGE ROGERS: All right.

* * *